

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX
F12
IN THE
United States Court of Appeals

For the District of Columbia Circuit

— United States Court of Appeals
for the District of Columbia Circuit

No. 21375 APR 18 1968

— *Nathan J. Paulson*

CLERK

CITY OF PARIS, KENTUCKY, Petitioner

v.

FEDERAL POWER COMMISSION, Respondent

and

KENTUCKY UTILITIES COMPANY, Intervenor

—
On Petition To Review an Order of the
Federal Power Commission.
—

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,375

CITY OF PARIS, KENTUCKY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

and

KENTUCKY UTILITIES COMPANY, *Intervenor*

On Petition To Review an Order of the
Federal Power Commission

JOINT APPENDIX

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Excerpts from Testimony of James L. Gorey

A. Well, those of us who have been connected with the City and familiar with its problems feel that we have plenty of reason to mistrust KU and its intention. The City of Paris has been suffering from lack of industrial development for a number of years now. We have not gained any industries whereas the towns all around us have been getting quite a few new industries. In fact, we lost one of our biggest ones and that factory has been standing vacant now for almost four years. Rightly or wrongly, this conflict and mistrust that has existed between KU and the City is believed by many people to be one of the reasons that is retarding the City's industrial development. There are many of us that think that KU has been exercising its influence to hold Paris back and keep it from getting new industry. I can't prove this, but it is an opinion which is widely held in the City of Paris.

119

Q23. Why didn't you go along with this proposal if it was

120

in the same language as that of East Kentucky but offered a more attractive rate? A. Well, some of us were inclined to go along with the KU proposal at that time. However, upon more careful consideration and after advice and consultation with our engineers and our attorneys, we decided the proposed contract was not sufficiently clear in a number of respects and that clarification should be sought and further consideration given. It was also brought to our attention by our engineers that although the rate in KU's proposal was more advantageous for the short time, if the city should attract more industry, the KU demand charge would come into effect sooner and the overall cost

to the City would in a matter of a few years be greater than under the East Kentucky proposal.

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Q33. Mr. Gorey, is there anything further that you would like to bring to the attention of the Commission at this time.
A. I would like to state that we of the City Commission

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of Paris welcome the interest which the Federal Power Commission in this case has shown in our problems. Frankly, we have been mistrustful of the influence the Kentucky Utilities Company has apparently exerted in our own Kentucky Public Service Commission and we are glad to have some independent body pass upon such matters as we now present, a body which we are confident is not biased in favor of privately owned utilities and against municipal and public owned utilities.

There is one further thing I would like to say. We have been involved in this controversy with Kentucky Utilities for a long, long time. In very recent months we have obtained the services of Lewis & Associates, engineering, and Mr. Ardery as a special utilities counsel. In the negotiations that passed back and fourth between the City, Kentucky Utilities Company and East Kentucky RECC, we were relying heavily upon the advice of our engineers and attorneys. We weighed very carefully the alternatives confronting the city as they were explained to us by the engineers and attorneys. We are satisfied with the conclusions we have reached.

I think it fair to state that Paris' position now is not that of a municipality seeking to negotiate a better

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contract with Kentucky Utilities Company. We made our decision based upon what we thought was the best information available and we signed a contract which has now been signed on behalf of East Kentucky RECC. Our

(133)

presence here is to seek assistance of this commission, if it deems it appropriate to give that assistance, to avoid unnecessary expense to Paris and unnecessary inconvenience to the landowners in Bourbon County, Kentucky over whose farms we must build a power line if assistance of this commission is not available.

I simply say this because it appears to me that Kentucky Utilities has done an excellent job of confusing the issue to make it appear that all we really have in this case is a question of how good a contract the commission will make KU offer. As I see it that is not the issue at all and I would like, to the extent that I am able, to make this point clear.

142

Excerpts From Testimony of William M. Lewis, Jr.

155

Q14. What is the situation with respect to Paris' load?
A. In 1965 the maximum one-hour demand on the City's system was 3950 KW. The net generation, exclusive of station use, was 15,705,000 KWH, of which 14,249,742 KWH were supplied to consumers and 1,455,258 were system losses. Early in 1965 we made a projection of the City's demands and estimated they would reach a maximum demand of 3970 KW in 1965 and 4200 KW in 1966. I think you can readily see, Mr. Ardery, that should the City lose, at the time of peak demand, either of its two largest generators, which by the way are used for base loading, it would be in serious trouble because it would result in a deficiency of 93 KW.

In August 1962, the engineering firm of Fosdick and Hilmer of Cincinnati, Ohio, estimated the City's peak demand would reach 4260 KW in 1965 and 4420 KW in 1966. If for some reason the City would not have available

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the two largest generating units, they would be in serious trouble and would have to drop a certain amount of their load during daily peaks.

200

Q. Are you presently employed by any cooperatives in Kentucky? A. Yes, I am.

Q. Which ones? A. I am employed by Grayson Rural Electric Cooperative Corporation and Kentucky Rural Electric Cooperative Corporation.

Q. You also testified that you have done work for a transformer manufacturer in Kentucky? A. Yes, sir.

Q. Will you please identify that manufacturer? A. That manufacturer is Kentucky Rural Electric Cooperative Corporation.

Q. And you are presently employed by Kentucky R.E.C.C.? A. Yes, sir, I am.

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Q. What was the first time—the date as near as you can fix it—when you worked with Mr. Ardery in connection with any Paris-East Kentucky arrangement? A. Well, now what constitutes working with Mr. Ardery?

Q. Talking to him. Any contact with him at all about this subject. You mentioned you just discussed with him some proper wording for a clause or something of that sort? A. Well, I talked with Mr. Ardery about municipalities in Kentucky probably from the first day I met him and I don't remember when that was. It has been several years ago—maybe 1954 or 1955.

Q. The specific talk you had with him relating to wording of some of the provisions in the Paris-East Kentucky arrangement, when did that first occur? A. I don't really know because Phil and I work on a number of cases and even on some other contracts not related to utilities, quite

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often I have discussed with him. I just couldn't exactly say.

Q. Then, you are aware, are you not, that Mr. Ardery is general counsel for East Kentucky R.E.C.C.? A. Yes, I am well aware of that.

Q. At the time you first had discussions relative to a Paris-East Kentucky arrangement, he was general counsel for East Kentucky R.E.C.C., but was not counsel for Paris, is that correct?

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A. I think that is correct.

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KU Exhibit 3

**ESTIMATED SAVINGS TO PARIS IN THE 1966 TO 1985 PERIOD BY PURCHASING
POWER FROM KENTUCKY UTILITIES COMPANY RATHER THAN
EAST KENTUCKY RECC**

Year	Capacity & Energy Charge From		Excess of East Ky. Over KU (2)-(3)	ALTERNATE — A		ALTERNATE — B	
	East Ky.	K.U.		Tap Line Owning Operating & Maint. Cost	Total Excess East Ky. Over KU (4)+(5)	KU Trans- mission Service Cost	Total Excess East Ky. Over KU (4)+(7)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1966	\$ 93,094	\$ 74,421	\$ 18,673	\$ 5,825	\$ 24,498	\$ 37,211	\$ 55,884
1967	98,672	78,854	19,818	5,825	25,643	39,427	59,245
1968	104,698	83,637	21,061	5,825	26,886	41,819	62,880
1969	111,402	93,695	17,707	5,825	23,532	44,300	62,007
1970	122,654	105,219	17,435	5,825	23,260	46,958	64,398
S.T. "A"	\$ 530,520	\$ 435,826	\$ 94,694	\$ 29,125	\$123,819	\$ 209,715	\$ 304,409
1971	\$ 134,669	\$ 117,518	\$ 17,151	\$ 5,825	\$ 22,976	\$ 49,795	\$ 66,946
1972	147,434	130,577	16,857	5,825	22,682	52,805	69,662
1973	160,963	144,414	16,549	5,825	22,374	55,998	72,547
1974	175,249	159,012	16,237	5,825	22,062	59,364	75,601
1975	190,293	174,380	15,913	5,825	21,738	62,908	78,821
S.T. "B"	\$ 808,608	\$ 725,901	\$ 82,707	\$ 29,125	\$111,832	\$ 280,870	\$ 363,577
S.T. "C"	\$1,339,128	\$1,161,727	\$177,401	\$ 58,250	\$235,651	\$ 490,585	\$ 667,986
1976	\$ 208,362	\$ 192,411	\$ 15,951	\$ 5,825	\$ 21,776	\$ 67,468	\$ 88,419
1977	225,424	209,786	15,638	5,825	21,463	71,503	87,141
1978	243,636	228,321	15,315	5,825	21,140	75,803	91,118
1979	263,009	248,036	14,973	5,825	20,798	80,377	95,350
1980	283,526	268,889	14,637	5,825	20,462	85,214	99,861
S.T. "D"	\$1,223,957	\$1,147,443	\$ 76,514	\$ 29,125	\$105,639	\$ 380,365	\$ 456,879
S.T. "E"	\$2,563,085	\$2,309,170	\$253,915	\$ 87,375	\$341,290	\$ 870,950	\$1,124,865
1981	\$ 305,204	\$ 290,898	\$ 14,306	\$ 5,825	\$ 20,131	\$ 90,324	\$ 104,630
1982	328,049	314,078	13,971	5,825	19,796	95,704	109,675
1983	352,431	338,792	13,639	5,825	19,464	101,437	115,076
1984	378,365	365,063	13,302	5,825	19,127	107,584	120,886
1985	405,855	392,873	12,982	5,825	18,807	113,987	126,969
S.T. "F"	\$1,769,904	\$1,701,704	\$ 68,200	\$ 29,125	\$ 97,325	\$ 508,986	\$ 577,186
TOTAL	\$4,332,989	\$4,010,874	\$322,115	\$116,500	\$438,615	\$1,379,936	\$1,702,061

(1788)

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(Filed Oct. 7, 1965)

FEDERAL POWER COMMISSION

No. E-7249

THE CITY OF PARIS, KENTUCKY
Paris, Kentucky, *Complainant*

v.

KENTUCKY UTILITIES COMPANY, 120 S. Limestone St.,
Lexington, Kentucky 40507, *Respondent*

Formal Complaint

The Complainant, The City of Paris, Kentucky, herein-after called "Paris" for its formal complaint against Kentucky Utilities Company, hereinafter called "KU" respectfully states:

1. The parties hereto and Complainant's counsel are as indicated herein. Correspondence, notices, orders and other papers herein are to be directed to Complainant's counsel.

2. Paris, a city of the fourth class, is the county seat of Bourbon County, Kentucky. It hereby petitions the Federal

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Power Commission ("Commission") for a full investigation and invocation of appropriate remedial action in respect to the subsequent details herein stated.

3. KU is a corporation engaged in generation, transmission and distribution of electric power and energy, duly organized under the laws of the state of Kentucky. Its principal place of business and executive office is as stated in the caption. It is a public utility under the provisions of the statutes of the Commonwealth of Kentucky and as specified by the Federal Power Act, § 201(e).

(1790)

4. KU holds membership in the Interconnected Systems Group which is an interconnected association of electric systems operating in several of the central and eastern United States. It also maintains interconnections and operates in continuous synchronism with TVA and Kentucky Power Company, the latter being a subsidiary and interconnected portion of the American Electric Power System. KU as a member of an interstate power pool and with interconnections which cross the boundaries of several states is subject to Commission jurisdiction as indicated in *F.P.C. v. Southern California Edison Co.*, 376 U.S. 205 (1964) and *Indiana & Michigan Electric Co.*,

1790

F.P.C. Docket No. E-7089 (1965).

5. Paris owns and operates its own distribution system, which consists of approximately 2200 metered outlets inside the municipal limits of the city of Paris. Power for the Paris city system is supplied by a diesel generating plant owned and operated by the city with a capacity of approximately 5500 kw.

6. For more than a year prior to the filing of this complaint, Paris has negotiated with KU, seeking establishment of a power exchange agreement whereby each might use the other's system and transfer power and energy under conditions which would be advantageous to both. Said negotiations failed to produce an agreement, though KU contends one draft of a proposal which passed between the engineer for Paris and KU, a copy of which is attached hereto and made a part hereof marked Annex A, now constitutes a firm contract between the two parties. This contract was never signed by any representative of Paris, nor was it approved by the city Commission by resolution as required by law for such contracts. Subsequent to the date KU contends its contract with Paris

(1790)

was made, KU offered Paris what it designated as a "Supplemental Agree-

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ment" changing the previous proposal in certain respects. Said "Supplemental Agreement" is attached hereto and made a part hereof marked Annex B. After additional negotiation in which Paris sought without success to obtain clarification from KU of its proposal as modified, Paris rejected the said Supplemental Agreement.

7. Thereafter, on the 31st of August, 1965, Paris entered into a contract with East Kentucky Rural Electric Cooperative Corporation, hereinafter called "East Kentucky" of Winchester, Kentucky. Said contract is attached hereto and made a part hereof marked Annex C.

8. East Kentucky and KU have numerous interconnections between their systems in the state of Kentucky. They operate synchronously and use their two systems as a single combined generation and transmission system under a contract dated August 7, 1963 and a supplemental agreement dated October 27, 1964. Said contract and agreement are attached hereto and made parts hereof being marked Annexes D and E, respectively. Under § 4.02(a) of the aforesaid contract (Annex D), the systems of KU and East Kentucky are centrally dispatched by a dispatching station owned and operated by KU.

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9. The aforesaid agreement between East Kentucky and Paris (Annex C), according to the judgment of the city Commission of Paris, offers more freedom of operation of the city system and greater guarantee of economic advantage than the contract offered by KU. On numerous occasions in negotiations with KU, Paris sought to get KU to be more specific in its commitment to supply "secondary energy" as defined by § 3.04 of the proposed

(1793)

KU contract (Annex A). However KU refused so to specify, and the Paris city Commission concluded that there might be no secondary energy supplied by KU and that Paris might thereby be forced at the whim of KU to operate its own generation instead of having any advantage of more economical power when such power and energy were available from KU through the combined KU-East Kentucky system.

10. Under the Paris-East Kentucky contract (Annex C) there are two ways whereby Paris may obtain East Kentucky power and energy: Such power and energy may be delivered over a 69 kv line owned by KU and extending into the city of Paris; or it may be delivered over a 69 kv line which the city would be required to build from the city limits of Paris in an easterly direction approximately eight miles to a transmission line owned by East Kentucky. Construction of such transmission line by

1793

the city of Paris would necessitate acquisition of approximately \$8,000 of right of way, and additional construction cost of approximately \$70,000. Such acquisition and construction would constitute wasteful and unnecessary duplication of existing KU facilities, having ample capacity to provide for the needs of the Paris system without jeopardizing service by KU to any of its existing customers.

11. Paris has requested KU to permit Paris to interconnect to the aforesaid 69 kv line for the purpose of obtaining East Kentucky power from the combined KU-East Kentucky transmission system and KU has refused to permit said interconnection. Said interconnection, if ordered by the Commission, would be consistent with the Federal Power Act § 202(b) as interpreted in *New England Power Co. v. FPC* — F2d — (USCA 1st Cir. July 21, 1965).

(1793)

12. In compliance with FPC Reg. § 32.2, filed herewith are Exhibits A, giving additional data on costs of construction and operation, and B, being a map of the area.

WHEREFORE Complainant respectfully requests:

1. That the Commission accept as filed and approve the executed contract between Paris and East Kentucky, Annex C herein, and

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2. That the Commission direct KU to permit interconnection by Paris to the KU 69 kv transmission line at a point inside the city of Paris as provided under Section 202(b) of the Federal Power Act.

Dated at Paris, Kentucky this 4th day of October, 1965.

Respectfully submitted,

JAMES S. WILSON
James S. Wilson
Paris, Kentucky, City
Attorney
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Louisville, Kentucky 40202
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PHILIP P. ARDERY
Philip P. Ardery, a Partner
of Counsel
*Attorneys for Complainant,
Paris, Kentucky*

(1795)

Fred T. Atkinson, William S. Chisholm, Carl Mastin and James L. Gorey, Mayor Pro Tem and City Commissioners of the city of Paris state that they have read the foregoing complaint and that the same is true to their best knowledge and belief and the knowledge and belief of each of them and that the at-

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torneys whose names appear hereon are authorized to subscribe hereto on behalf of the Complainant.

FRED T. ATKINSON
Fred T. Atkinson, Mayor
Pro Tem and Commis-
sioner

WILLIAM S. CHISHOLM
William S. Chisholm, Com-
missioner

CARL MASTIN
Carl Mastin, Commissioner

JAMES L. GOREY
James L. Gorey, Commis-
sioner

STATE OF KENTUCKY }
COUNTY OF BOURBON } Sct

Subscribed to and sworn before me this 4th day of October, 1965 by Fred T. Atkinson, William S. Chisholm, Carl Mastin and James L. Gorey, Mayor Pro Tem and City Commissioners of the City of Paris, Kentucky.

EDWARD H. GOREY
Notary Public in and for the
County and State afore-
said

My commission expires:
January 16, 1967

(1821)

1821

**Interchange Agreement Between City of Paris, Kentucky and
East Kentucky Rural Electric Cooperative Corporation**

THIS AGREEMENT made this 31st day of August, 1965, between the CITY OF PARIS, a municipal corporation duly chartered under the laws of the Commonwealth of Kentucky (hereinafter called PARIS), and EAST KENTUCKY RURAL ELECTRIC COOPERATIVE CORPORATION, a corporation organized under the laws of the Commonwealth of Kentucky (hereinafter called EAST KENTUCKY),

WITNESSETH:

WHEREAS, EAST KENTUCKY owns, operates and maintains a 69 kv transmission line in the vicinity of PARIS for the transmission of electrical energy from its various generation plants to its members, and

WHEREAS, PARIS owns, operates and maintains a generating station and a distribution system which supplies electrical energy within PARIS, and

WHEREAS, each party, in the normal course of operations will, from time to time, have capacity surplus to the requirements of its members or consumers respectively, and

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WHEREAS, it is deemed advisable and mutually advantageous to each of the contracting parties to interconnect their systems and provide for the interchange of electrical energy:

Now, THEREFORE, for and in consideration of the premises and of mutual benefits to be derived from the covenants herein set forth, the parties hereto agree as follows:

(1823)

ARTICLE I

Term

1.01. This AGREEMENT shall be binding upon the parties hereto for a period of ten (10) years beginning August 31, 1965 and from year to year thereafter, until written notice of intent to terminate is given by either party to the other not less than three (3) years prior to the expiration date of the original term, or any extension thereof.

ARTICLE II

Interconnection

2.01. The electric systems of EAST KENTUCKY and PARIS shall be interconnected at a point designated in Section 2.02 of Article II herein. The interconnection shall have a capacity of not less than 5,000 kva and the interchange of electrical energy shall be at a nominal 69 kv, 3 phase and 60 cycles.

Voltage regulation at the point of delivery shall normally be within plus or minus 10% of the nominal voltage.

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The point of interconnection shall be the point of delivery.

2.02. The point of interconnection shall be at a mutually selected point close to Stone Road where EAST KENTUCKY's transmission line runs north-south across the eastern end of Bourbon County, Kentucky.

2.03. EAST KENTUCKY shall provide, own, operate and maintain suitable switching facilities at or adjacent to the point of interconnection with its 69 kv line.

2.04. PARIS shall provide, own, operate at its expense, and maintain:

A. A 69 kv transmission line from EAST KENTUCKY's switching facilities to its present generating plant.

(1823)

- B. A 5,000 kva, 67,000 volt substation located adjacent to the present generating plant, and
- C. Suitable relaying, synchronizing, metering and control equipment to permit operation of PARIS' generators in parallel with EAST KENTUCKY's system and to prevent a disturbance to EAST KENTUCKY's system because of a disturbance on PARIS' distribution system or generators.

2.05. Nothing contained in this agreement shall restrict PARIS from supplying, purchasing, and exchanging capacity and energy with other parties provided, however, that any interconnection between

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PARIS and other parties will be made only with prior agreement by EAST KENTUCKY.

2.06. The parties hereto agree to the use of their transmission systems for the delivery of power one to the other from sources which are or may hereafter be interconnected with such systems provided that sufficient transmission capacity is available in the systems and that reasonable wheeling charges will be applicable.

2.07. The design of the facilities provided by each party shall be subject to the approval of the other party.

ARTICLE III

Definitions

3.01. Emergency power, as used herein, is that capacity and energy requested by either party to meet a temporary need due to an emergency breakdown or prearranged maintenance of its generation and transmission facilities.

(1825)

3.02. Deficiency power, as used herein, shall mean a block of capacity and accompanying energy which one party purchases from the other and/or other parties as provided in Sections 2.05 and 2.06 herein for a period of one year or multiples thereof, for the purpose of obtaining system net capability.

Deficiency power, when available, will be used by the purchasing party to defer the investment in generating units and to make possible the installation of larger and more efficient units.

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3.03. Secondary energy, as used herein, shall be energy furnished by either party to the other, in lieu of energy which otherwise is available from other sources of the receiving party. Secondary energy is to be supplied on a schedule, as requested, to the receiving party and will be agreed upon, in advance, by the supplying party.

3.04. System net capability, as used herein, shall mean the generating capacity of each party's generating units, plus any deficiency purchases from other parties and minus any deficiency sales to other parties.

3.05. Generating capacity, as used herein, shall mean that net load (after deducting station service) a plant is capable of carrying continuously for a period of at least four (4) hours. In case of dispute as to generating capacity, it shall be determined by test operation observed by representatives of both parties.

3.06. Usable condition, as used herein, shall mean, steam generating equipment capable of being started within eight (8) hours' time and other generating equipment within one (1) hour's time. Units down for emergency or routine maintenance shall be considered in usable condition if the

(1825)

party owning or operating same is proceeding with the needed repairs.

3.07. Maximum demand, as used herein, shall mean the highest integrated net demand on that party's system for any fifteen (15) minute period for the year beginning on January 1.

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3.08. Primary utility responsibility, as used herein, shall mean the responsibility of a party to provide the power requirements of its members or consumers.

3.09. System reserve, as used herein, shall mean any system net capability in excess of the maximum demand on that party's system.

ARTICLE IV

Capacity Requirements

4.01. It is particularly recognized by both parties to this agreement that each party has a primary utility responsibility to its members and consumers, and that all emergency power, deficiency power and secondary energy interchange hereunder is to be from excess or surplus capacity not required for the primary utility responsibility of the furnishing party. Provided, however, that changes, expected or otherwise, in the primary utility responsibility of a party shall not operate to relieve either party from any firm commitments assumed under this agreement.

4.02. The parties hereto agree to maintain system reserve of at least ten (10) percent of maximum demand. Such system reserve shall be maintained by either:

1. Generating capacity in useable condition.
2. Purchase of deficiency power from the other party.
3. Purchase through other interconnections.

(1828)

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ARTICLE V

Interchange of Power and Energy

5.01. Except as hereinafter provided, EAST KENTUCKY and PARIS will each normally provide their own requirements for electrical energy.

5.02. During an emergency, each party agrees to assist the other to the limit of its ability, of which it shall be the sole judge, by delivering emergency power and energy to the other through the interconnection.

5.03. It is understood and agreed that either party may return to the other energy which has been supplied under the provisions of Section 5.02 of this Article, at any time within the six months after such energy has been taken. Energy shall be returned at times which are mutually agreeable and normally shall be returned over approximately the same hours it was originally received. Unless otherwise mutually agreed upon, any energy which has not been returned within six months shall be settled as herein-after provided in Article VII, Section 7.01.

5.04. EAST KENTUCKY and PARIS shall consult in advance upon schedules for regular maintenance of each other's generating equipment and whenever practicable shall agree upon such schedules. During such periods of agreed scheduled maintenance of one party's generating equipment, the other party will provide emergency interchange if requested.

1828

5.05. EAST KENTUCKY will deliver and sell to PARIS and PARIS will deliver and sell to EAST KENTUCKY secondary energy at such times as the purchasing party may desire and as such secondary energy is available. Purchases of

(1828)

secondary energy shall be billed in accordance with the schedule set forth in Article VII, Section 7.02.

5.06. Either party desiring to purchase deficiency power from the other shall notify that party in writing of its intent to purchase and the estimated amounts and years over which deficiency purchases are required. Any purchase of deficiency power shall be in kw years for a period agreed upon at the time such purchase is negotiated. Any sale so negotiated, shall be firm during the agreed term of that sale. The actual amount of deficiency power purchased will be determined in accordance with Section 5.07 of this Article.

5.07. The actual purchase of deficiency power by either party shall be as follows:

A. On or before September 1 of each year, each party shall estimate the expected maximum demand of its system in kw, for each of the ensuing three (3) years, and shall add thereto its required system reserve.

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B. In the event said maximum demand in kw plus required system reserve is in excess of the system net capability of either party, the deficient party may request to purchase all or some specified portion of such deficiency power for all or some specified portion of the three (3) year period (not less than one (1) year) from the other party. Within ninety (90) days from the receipt of such a request, the supplying party shall inform the requesting party, in writing, whether or not it can furnish the deficiency power, as requested, or for any shorter period. In the event the supplying party agrees to supply such deficiency power, the supplying party shall be obligated to supply such deficiency power for the period.

(1830)

C. On or before January 15 of each year, each party shall submit to the other the actual net maximum demand of its system and the system net capability for the preceding year. In the event deficiency power was being supplied by one party to the other, necessary adjustments, debits or credits, from the estimated deficiency shall then be made.

Purchase of deficiency power by either party from the other shall be billed in accordance with the schedule set forth in Article VII, Sections 7.02 and 7.03.

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ARTICLE VI

Metering

6.01. The quantities of power and energy delivered under this AGREEMENT shall be metered at the low voltage side of the transformer installed by PARIS, as provided in Article II, Section 2.04.

6.02. It is the intent to bill energy transferred through the point of interconnection at 69 kv, therefore the meter readings of the meters, as provided in Section 6.01, shall be adjusted to reflect transmission and transformation losses.

Such adjustments shall be, unless revised as provided below:

- A. The "In" meter reading to PARIS shall be increased two and one-half percent (2½%).
- B. The "Out" meter reading from PARIS shall be reduced two and one-half percent (2½%).

The above percent adjustment may be revised, from time to time, to reflect actual operating conditions. Such

(1830)

revisions shall be mutually agreeable to both parties to this agreement.

6.03. EAST KENTUCKY shall provide, own, operate and maintain an interchange meter at the low voltage side of the transformer, including metering equipment, instrument transformers and associated appurtenances, which shall record integrated demand for each fifteen (15) minute period and totalize kwhr for each direction.

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PARIS, at its own expense, shall furnish EAST KENTUCKY a suitable place in its power plant and/or substation for EAST KENTUCKY to install its metering equipment.

6.04. PARIS shall provide, own, operate and maintain all other necessary metering equipment, instrument transformers and associated appurtenances required for operating purposes including the following:

- A. An indicating kw meter to indicate kw flow in both directions.
- B. An ammeter to show ampere loading of the interconnection.
- C. A voltmeter to show low side voltage of the interconnection.
- D. An indicating varmeter to indicate var flow in both directions.
- E. Totalizing metering equipment to record the PARIS integrated net system demand for each fifteen (15) minute period.

6.05. All meters located in PARIS' power plant, or in the substation, or adjacent thereto, regardless of ownership, shall be read hourly by PARIS, and at other times when required by EAST KENTUCKY, and suitable records shall be

(1832)

kept by PARIS and furnished to EAST KENTUCKY when and if requested.

6.06. Each party shall test and calibrate all meters installed and owned by it annually, within sixty (60) days after installation and after a change of instrument transformers, and at other times when requested by the other party. The owner of the meter shall bear the expense of the meter test and calibration. Any test shall be in accordance with standard engineering practices. The party owning the meter shall give reasonable advance notice of all tests and calibrations so that representatives of the other party may be present.

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6.07. If any meter, upon testing, is found to register in error by more than two percent (2%) fast or slow, or fails to register, the meter reading in the current month shall be adjusted to reflect the correct usage. If the period of inaccuracy is not known, it shall be assumed to be one-half the interval since the last preceding test and the bills rendered for the preceding month(s) shall be adjusted accordingly. In the case of all adjustments, when the error of the meter is known, bills shall be adjusted on the basis of the known error, and when the error of the meter is unknown, or when the meter fails to register, bills shall be adjusted on the basis of the best available data. The meter or other equipment found to be inaccurate or defective shall be promptly repaired, adjusted or replaced.

ARTICLE VII

Rates and Billings

7.01. It is understood and agreed that the electrical system of the parties hereto shall be so operated that the interchange of energy under the provisions of Article V,

(1832)

Section 5.02 shall practically cancel each other. Statements of energy delivered by either party shall be rendered to the other party monthly. On June 30 and December 31 of each year during the life of this contract, any balance existing for six months or more shall be settled in full for cash within fifteen days after a bill for such balance is rendered. The rates to be charged for such settlements shall be 1.0 cents per kwhr for all energy delivered.

7.02. Energy purchased under the provisions of Article V, Sections 5.05, 5.06 and 5.07 shall be billed monthly in accordance with the following rate schedule:

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All energy at 5.60 mills/k.w.h. for the energy delivered to either party.

For energy purchased by PARIS, the above energy rates shall be increased or decreased by .00125 cent per kwhr for each 0.1 cent change in the average cost of fuel for the month, above 21 cents or below 16 cents per million Btu at boilers of steam electric generating stations of EAST KENTUCKY.

For energy purchased by EAST KENTUCKY, the above energy rates shall be increased or decreased by .0083 cent per kwhr for each 0.1 cent change in the average cost of fuel for the month, above 77 cents or below 47 cents per million Btu at the units of the PARIS plant.

7.03. The capacity charge applicable to the estimated deficiency in system net capability as determined in Article V, Section 5.07, shall be \$13.80 per kw per year, payable monthly.

Adjustment of capacity charge, based on actual deficiency in system net capability as determined in Article V, Section 5.07 shall be made and an appropriately adjusted lump

(1834)

sum billing (or credit) at the rate of \$13.80 per kw per year, shall be made and rendered within ten (10) days after January 25 of the following year.

7.04. Should any federal, state or local tax, in addition to such taxes as now exist, be levied upon the electric energy to be sold hereunder, or upon the sale of said energy, or upon the seller measured by the energy sold, or the revenue therefrom, such tax shall be added to the net bill as determined in this Article.

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7.05. In the event there should be substantial changes in the economic conditions which would substantially affect the cost of providing generating capacity or the cost of production of electric energy, it is the intention of the parties hereto that a revision in rates should be considered and effected.

7.06. All monthly bills for services supplied pursuant to this AGREEMENT shall be rendered by the delivering party to the purchasing party not later than fifteen (15) days after the end of the period to which such bills are applicable. Unless otherwise agreed by the Operating Representatives, such periods shall be from 12:01 A.M., of the first day of one month to 12:01 A.M., of the first day of the succeeding month. Bills shall be due and payable within ten (10) days from the date such bills are rendered and payments shall be made when due and without deduction. Interest on any unpaid amount from the date due until the date upon which payment is made shall accrue at the rate of one-half percent per month or fraction thereof.

7.07. In the event a party desires to dispute the correctness of any bill rendered by the other party under the provisions hereof, it shall, nevertheless, pay the full amount of such bill, when due, but may submit to the other party,

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at the time the bill is paid, a statement in writing setting forth in detail the items disputed. Such complaint shall be investigated immediately and both parties will endeavor to agree within thirty (30) days on the proper amount due.

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ARTICLE VIII

Operating Representatives

8.01. Each party shall designate an Operating Representative and an alternate who shall be fully authorized to:

- A. Cooperate and agree on all matters, not specifically provided for herein, on which cooperation and agreement are necessary in order that the advantages to be derived hereunder may be realized by the parties to the fullest possible extent, and
- B. Prepare the details of operating and maintenance schedules, control and operating procedures, and interchange accounting procedures to implement the provisions of this AGREEMENT.
- C. To cooperate and arrange for the interchange of capacity and energy, and to agree upon the amounts of such capacity and energy.

8.02. The Operating Representatives shall meet as often as may be mutually agreed upon and at such times and places as may be agreed upon. All decisions or agreements of the Operating Representatives shall be reduced to writing.

ARTICLE IX

Records and Inspections

9.01. In addition to meter records, the parties shall keep such log sheets and other records as, in the opinion of the Operating Representatives, may be needed to afford a clear

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history of the various movements of power and energy between the systems of the parties in transactions hereunder. The originals of all such meter records and

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other records shall be open to inspection by representatives of the parties and by the Operating Representatives.

9.02. Each party shall furnish to the Operating Representatives appropriate data from meter registrations and from other sources on such time basis as are established by the Operating Representatives when such data are needed for settlement, special test, operating records, or other purposes consistent with the objectives hereof. As promptly as practicable after the end of each month, each party shall render to the other party, statements setting forth appropriate data from meter registrations and other sources in such detail and with such segregation as may be needed for operating records and for settlements hereunder.

9.03. Any authorized agent, or agents, of EAST KENTUCKY shall be permitted on or about the premises of the PARIS generating plant or substation for the purpose of inspecting the property and equipment of both EAST KENTUCKY and PARIS and doing whatever may be necessary to its own property and equipment for the proper performance of EAST KENTUCKY of this AGREEMENT, provided such agent, or agents, shall not unnecessarily interfere with the employees or operations of Paris' equipment.

ARTICLE X

Uncontrollable Forces

10.01. Neither party shall be considered to be in default in respect to any obligation under this AGREEMENT if prevented from fulfilling such obligation by reason of uncon-

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trollable forces. For the purposes of this AGREEMENT, the term "uncontrollable forces" means any cause beyond the control of the party affected, including, but not limited to: failure of facilities not due to lack of proper care or

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maintenance, flood, backwater caused by flood, earthquake, storm, lightning, fire, explosion, epidemic, war, national emergency, riot, civil disturbance, labor disturbance, sabotage, and restraint by court or public authority, which by exercise of due diligence and foresight such party could not reasonably have been expected to avoid. Either party rendered unable to fulfill any obligation by reason of uncontrollable forces shall exercise due diligence to remove such inability with all reasonable dispatch.

ARTICLE XI

Notices

11.01. Except in cases where the type or length of notice is specifically stated in this AGREEMENT, the manner and time of all notices, calls, requests, schedules and other communications needed to conduct the operations covered by this AGREEMENT shall be arranged by the Operating Representatives. It is anticipated that the greater part of the communications between the parties will be by telephone, but it is intended that a record be kept of all telephone communications, and either party may call upon the other for written confirmation of the sending or receipt of all notices, calls, requests, schedules, and other communications by telephone.

ARTICLE XII

Assignment

12.01. This AGREEMENT shall be binding upon and inure to the benefit of the parties hereto and their respective

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successors and assigns, provided, however, that no assignment hereof shall be made by either party hereto without the written consent of the other.

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12.02. The several provisions of this agreement are not intended to and shall not create rights of any character whatsoever in favor of any persons, corporations, or associations other than the parties to this agreement, and the obligations herein assumed are solely for the use and benefits of the parties to this agreement.

ARTICLE XIII

Effective Date

13.01. Immediately following the date of signing of this AGREEMENT by both parties, each party hereto shall proceed with the acquisition and installation of its respective facilities as provided herein and complete the interconnection between the two systems as expeditiously as possible, and upon the date of completion of said interconnection this AGREEMENT shall become effective and the delivery of power and energy hereunder and payment therefor shall commence, and said date of completion shall become the effective date hereof.

ARTICLE XIV

Approvals

14.01. This AGREEMENT and the binding effect thereof are subject to the jurisdiction of any governmental authority or authorities having jurisdiction in the premises.

IN WITNESS WHEREOF, the CITY OF PARIS, pursuant to a resolution passed by its Board of City Commissioners, on the 31st day of August 1965, has caused this AGREEMENT to be signed in its corporate name, by its duly authorized

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representative and its corporate seal to be hereto affixed
and attested by its Clerk; and EAST KENTUCKY RURAL
ELECTRIC

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COOPERATIVE CORPORATION has caused ths AGREEMENT to be
executed in its corporate name and its corporate seal to be
hereto affixed and attested by its duly authorized officers,
all on the day and year first above written.

CITY OF PARIS, KENTUCKY

By FRED T. ATKINSON
Mayor Pro Tem
(duly authorized represent-
ative)

Address Paris, Ky.

Attest:
LOUIS ELVORE
Clerk

EAST KENTUCKY RURAL ELECTRIC
COOPERATIVE CORPORATION

By ALEX B. VEECH
Title President
Address Finchville, Ky.
Date

Attest:
JAMES S. PATTERSON
Secretary
Approved:

ADMINISTRATOR OF REA

(1883)

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(Docketed Nov. 9, 1965)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. E-7249

CITY OF PARIS, KENTUCKY, *Complainant*

v.

KENTUCKY UTILITIES COMPANY, *Defendant*

Answer of Kentucky Utilities Company

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The defendant, Kentucky Utilities Company, herein referred to as "KU", for its answer to the Complaint herein of the City of Paris, Kentucky, herein referred to as "Paris", states as follows:

1. KU admits the allegations of paragraph 1 of the Complaint.
2. KU admits the allegations of paragraph 2 of the Complaint.
3. KU admits the allegations of paragraph 3 of the Complaint.
4. KU admits the allegations of paragraph 4 of the Complaint, except that it denies that it is subject to

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the jurisdiction of the Commission sought to be invoked by Paris in its Complaint.

5. KU admits the allegations of paragraph 5 of the Complaint.

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6. KU admits the allegations of paragraph 6 of the Complaint to the effect that for more than a year prior to the filing of the Complaint it negotiated with Paris seeking to establish a power exchange agreement whereby each might use the other's system and transfer power and energy under conditions which would be advantageous to both, and admits that it contends that the draft of proposal or Interchange Agreement which was submitted to KU by the engineer representing Paris constitutes and evidences an agreement reached between Paris and KU, and admits that the said Interchange Agreement was never signed by a representative of Paris. KU is without knowledge or information sufficient to form a belief as to the truth of the allegation that the said Interchange Agreement was not approved by the City Commission by resolution, although KU admits that no resolution approving the said Interchange Agreement is found in the minutes of the City's legislative body; and KU states that at the time said Interchange Agreement was submitted to KU by the engineer representing Paris, the engineer stated in writing that the City of Paris, "at its meeting on March 2," instructed the preparation of the Interchange Agreement and directed such engineer to advise KU that Paris expected an

1884

acceptance or rejection of the proposal by March 22, 1965, which proposal, as submitted by said engineer, was accepted in writing by KU. KU admits that at the request of Paris it offered Paris the Supplemental Agreement referred to in paragraph 6 of the Complaint, and admits that Paris rejected said Supplemental Agreement, but denies that Paris, without success, sought to obtain a clarification of the Interchange Agreement submitted by Paris, as modified by the Supplemental Agreement.

7. KU admits that the draft of Interchange Agreement, copy of which is attached as Annex C with the Complaint,

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was signed on behalf of East Kentucky Rural Electric Co-operative Corporation, herein referred to as "East Ky.", and Paris; but KU denies that said Interchange Agreement so signed on behalf of Paris and East Ky. is a valid or binding contract under applicable provisions of Kentucky law.

8. KU admits the allegations of paragraph 8 of the Complaint, except that KU denies that the two systems of KU and East Ky. are operated as a single combined generating and transmission system.

9. KU denies the allegations of paragraph 9 of the Complaint.

10. KU denies the allegations of paragraph 10 of the Complaint, and states that KU may not be required to deliver energy to East Ky. for Paris or to Paris for East Ky. over the existing facilities of KU.

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11. KU denies the allegations of paragraph 11 of the Complaint.

12. KU admits the allegations of paragraph 12 of the Complaint.

13. It would be inappropriate and not in the public interest for the Federal Power Commission, herein referred to as the "Commission", to grant the relief sought in the Complaint filed by Paris.

14. In 1923 KU acquired the electric utility facilities used to serve customers in and in the vicinity of Paris, and since that time KU has owned distribution facilities in and in the vicinity of Paris and has continuously served electric energy to customers in the area. KU's distribution system in Paris is maintained pursuant to a franchise granted to it by Paris in 1957, which franchise will expire

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in 1977. In 1933, Paris financed by the issue of municipal bonds and built a generating plant and distribution system, from which it has continuously since that time served electric energy to other customers in the City.

15. During the period from December 14, 1959, to January 22, 1960, under an arrangement made between KU and Paris, KU supplied to Paris energy required to serve some of the customers of the latter due to a breakdown of Paris' generating facilities. KU has rendered service to industrial customers in Paris which required service of a nature which could not be rendered by Paris consistent with supplying

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acceptable service to its other customers.

16. At the present time Paris renders service to approximately 2100 customers in the City of Paris, from which it derives an annual revenue of approximately \$350,000. At the present time KU renders service to more than 750 customers in Paris, from which KU derives an annual revenue of approximately \$100,000, and renders service to more than 2500 customers outside the City of Paris but in the vicinity of Paris, from which it derives an annual revenue of approximately \$400,000.

17. From time to time since 1959 KU and Paris have had negotiations looking toward the sale of energy by KU to Paris, which said negotiations resulted in the proposal made by Paris on March 10, 1965, to purchase energy from and exchange energy with KU pursuant to the terms of a draft of agreement, copy of which is filed as Annex A with the Complaint, and which proposal was accepted by KU on March 22, 1965. Thereafter, Paris requested variations in the terms of said agreement in certain respects, and such variations, acceptable to KU, were set forth in a

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draft of Supplemental Agreement, a copy of which is filed as Annex B with the Complaint.

18. Notwithstanding the agreement reached between KU and Paris, East Ky., with full knowledge of said agreement, solicited an arrangement to serve electric energy to, and

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exchange energy with, Paris pursuant to the terms of the draft of Interchange Agreement between Paris and East Ky., a copy of which is filed as Annex C with the Complaint.

19. The cost to Paris of energy obtained from KU pursuant to the terms of the Interchange Agreement (Annex A) and the Supplemental Agreement (Annex B) would be very substantially less than if such energy were obtained from East Ky. pursuant to the draft of Paris-East Ky. Interchange Agreement (Annex C) under the terms of which Paris is to construct a transmission line to connect its distribution facilities with the transmission facilities of East Ky. The cost of energy to Paris under the terms of the Paris-KU agreement as supplemented (Annex A and Annex B) will be substantially less than the cost of energy to Paris if obtained from East Ky. through an interconnection such as is sought in the Complaint.

20. If KU should be required to make the interconnection applied for in the Complaint, the cost to Paris of energy supplied by East Ky. to Paris, and the cost to East Ky. of energy supplied to it by Paris, will be increased by such amount as is determined to be reasonable compensation to KU for the use of its facilities for such purposes.

21. KU, continuously since acceptance by it on March 22, 1965, of the aforesaid Interchange Agreement (Annex A), has been and is now willing to serve Paris pursuant

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to the terms of that Agreement, and, if Paris so desires, pursuant to the terms of the said Agreement as supplemented by the draft of Supplemental Agreement (Annex B), submitted to Paris after Paris had requested changes in the Interchange Agreement; and KU is also willing to serve energy to, and interchange energy with, Paris under any other terms and provisions acceptable to the parties and approved by the Commission.

22. The provisions of the August 7, 1963, Agreement between KU and East Ky., which Agreement was submitted to and approved by the Public Service Commission of Kentucky, herein referred to as the "Kentucky Commission", set forth the obligations of the parties thereto with respect to the interconnection of their transmission systems, and the said Agreement contains no obligation on the part of KU to interconnect its system with the distribution and generating system of Paris for the purpose of transmitting energy for East Ky. to serve Paris or of transmitting energy in connection with the interchange of energy between Paris and East Ky.

23. East Ky. is a "Utility" as defined in the applicable provisions (§§ 278.010, et seq.) of the Kentucky Revised Statutes, and as such it is prohibited from constructing any plant or generating facilities without first obtaining from the Kentucky Commission a certificate of convenience and necessity authorizing such construction.

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On April 27, 1960, East Ky. filed with the Kentucky Commission its Application (Case No. 3818) for a certificate authorizing the construction of a steam generating station on Lake Cumberland near Burnside, Kentucky, and related transmission facilities, which Application was op-

(1890)

posed by KU on the ground that such facilities were unnecessary and uneconomical. In its Application, East Ky. stated that, "The purpose of the construction proposed herein is to supply loads of applicant's members and will not compete with any other utility", and that such construction, "is to be financed by a loan from the United States acting through the Rural Electrification Administration." Notwithstanding the opposition of KU to the Application of East Ky., the Kentucky Commission granted said Application, but in so doing stated in its Opinion and Order that:

"The Commission feels an obligation to state in this case its policy in respect to service areas and loads where controversy exists between East Kentucky, its Member Cooperatives, KU, or other utilities. The Commission will in the future, as it has in the past, follow the principals set out in Section 9 of the contract above referred to, in controversies between East Kentucky's Member Cooperatives and KU or other private utilities."

Among the provisions of the aforesaid Section 9 referred to in the Commission's Opinion and Order, the provisions of which Section 9 were set forth in said Opinion and Order, it is stated that:

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"(a) East Kentucky will not furnish nor deliver electric service directly or through its Members to any incorporated municipality not now receiving REA service and will so limit the use of power it supplies its Members in its power contracts with them, except as may be agreed to by the parties hereto.

"(b) East Kentucky will not sell nor supply nor deliver electric energy to any other than its Member Cooperatives, Kentucky Utilities, TVA and other elec-

(1890)

tric utility companies which are serving Cooperative Members of East Kentucky."

24. Paris has not at any time received REA service and it is not a member and cannot, pursuant to applicable statutes of Kentucky, become a member of East Ky.

25. The Burnside plant of East Ky., constructed pursuant to the certificate issued by the Kentucky Commission, is one of two generating plants operated by East Ky. and interconnected with its transmission system and the transmission system of KU, and East Ky. cannot serve energy to Paris without serving energy generated at its Burnside plant.

26. Under applicable provisions of the Rural Electrification Act (7 USC §§ 904, 913), the Administrator of the provisions of said Act is not authorized to make loans for the purpose of financing the construction or operation of generating and transmission facilities or systems for furnishing electric energy to persons within the boundaries of any city, village or borough having a population in excess of 1500 inhabitants. Paris has a population in excess of 8000 inhabitants. The construction

1891

of all of the generating and transmission facilities of East Ky. was financed with funds obtained through loans made by the Administrator of the Rural Electrification Act, and the proposed use of such generating plant and transmission facilities for the purpose of furnishing electric energy to Paris would be contrary to the aforesaid provisions of the Rural Electrification Act.

27. The Commission does not have jurisdiction of the Complaint of Paris for the following reasons:

(a) Paris is a Kentucky municipal corporation and is not a "person" engaged in the transmission or sale of

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electric energy, as the word "person" is defined in the Federal Power Act, herein referred to as the "Act", and is not entitled under the provisions of Section 202(b) of the Act to the relief sought in its Complaint.

(b) Paris is a municipality as defined in the Act, and owns and operates an electric generating system, and Paris is not a "person" as defined in the Act and is not entitled under the provisions of Section 202(b) of the Act to the relief sought in its Complaint.

(c) Paris is a political subdivision of Kentucky and an agency, authority and instrumentality thereof and under the terms of Section 201(f) of the Act neither the provisions of Section 202(b) of the Act or any of the provisions of any other section of the Act apply to or can be

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deemed to include Paris.

(d) By its Complaint, Paris seeks to obtain an order directing KU to interconnect its transmission system with the generating and distribution system of Paris for the purpose of forcing KU to transmit energy (i) generated by East Ky., and proposed to be sold by it to, and exchanged by it with, Paris, and (ii) generated by Paris and proposed to be sold by it to, and exchanged by it with, East Ky.

(e) The transmission facilities of KU and the transmission facilities of East Ky., and the interconnected transmission facilities of KU and East Ky., are interconnected with the generating and transmission facilities of Tennessee Valley Authority, a Federal governmental agency and if KU is required to establish the interconnection sought by Paris in its Complaint the result will be that KU will be required to transmit by means of said interconnection energy generated by Tennessee Valley Au-

(1892)

thority and other Federal government owned power generating projects.

(f) By its Complaint, Paris seeks to obtain an order directing KU to interconnect its transmission system with the generating and transmission system of Paris for the purpose of permitting East Ky. to encroach upon and invade the service area of KU, thereby creating a controversy

1893

which is subject to the jurisdiction of the Public Service Commission of Kentucky.

WHEREFORE: The defendant, Kentucky Utilities Company, requests that the Complaint of Paris be dismissed.

KENTUCKY UTILITIES COMPANY

WILLIAM A. DUNCAN

By William A. Duncan,
President

SQUIRE R. OGDEN
610 Marion E. Taylor Bldg.
Louisville, Kentucky 40202

MALCOLM Y. MARSHALL
610 Marion E. Taylor Bldg.
Louisville, Kentucky 40202

RALPH D. STEVENSON
72 West Adams Street
Chicago, Illinois 60603

*Counsel for Kentucky
Utilities Company*

(1894)

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State of Kentucky }
County of Fayette } ss.

William A. Duncan states that he is President of Kentucky Utilities Company, that he has read the foregoing Answer subscribed by him as President, and that the statements of fact contained therein are true to the best of his knowledge and belief.

WILLIAM A. DUNCAN
William A. Duncan

Subscribed and sworn to before the undersigned Notary Public in and for the State and County aforesaid, this 6th day of November, 1965.

LOUISE PRICE PAGE
Louise Price Page
*Notary Public, Fayette
County, Kentucky*

My Commission Expires June 26, 1969

(SEAL.)

(1895)

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(Filed Jan. 5, 1966)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. E-7249

CITY OF PARIS, KENTUCKY, *Complainant*

v.

KENTUCKY UTILITIES COMPANY, *Defendant*

Notice of Intervention of the Public Service Commission
of Kentucky

Pursuant to the provisions of Rule 1.8 of the Rules of Practice and Procedure of the Federal Power Commission, the Public Service Commission of Kentucky hereby gives notice of its intervention in this proceeding and, as grounds therefor, states as follows:

1. The intervener, hereinafter called the "Kentucky Commission," is a regulatory body of the Commonwealth of Kentucky, organized and operating under the provisions of Chapter 278 of the Kentucky Revised Statutes and having jurisdiction to regulate electric utilities and the rates, charges, services and

1896

methods and practices of such utilities in and for the sale and distribution of electric energy.

2. The Kentucky Commission has jurisdiction of the controversy which is the subject matter of this proceeding. By its complaint the City of Paris, hereinafter called "Paris," seeks to force an interconnection of its electric system with the transmission facilities of Kentucky Utilities Company, hereinafter called "KU," in order that KU

(1897)

may be required to transmit over its facilities energy generated by either East Kentucky Rural Electric Cooperative Corporation, hereinafter called "East Kentucky," or Paris and sold to or exchanged with the other.

3. The proceeding involves the issues of whether it is in accordance with the laws of Kentucky and the rules, regulations and orders of the Kentucky Commission for KU or East Kentucky to provide the service required by Paris; whether under applicable law East Kentucky has the authority to serve Paris; whether such service would represent a conflict with and an encroachment upon the established service area of KU; what facilities must be constructed in order to provide the service required by Paris; and whether a certificate of convenience and necessity should be granted authorizing such construction and service, and if so, upon what terms and conditions.

4. It is the duty of the Kentucky Commission to exercise its jurisdiction and determine the aforesaid issues under applicable principles of law, including the provisions of Sections 278.020, 278.030 and 278.040

1897

of the Kentucky Revised Statutes, Rule VIII 2b of the Kentucky Commission's Rules of Procedure, and the rules and policy of the Commission, as evidenced by its decisions, in respect of the encroachment by one utility into the service area of another. Filed herewith as Exhibit 1 is a copy of the Rules of Procedure of the Kentucky Commission; and filed herewith as Exhibit 2 is a copy of the order entered by the Kentucky Commission in Case No. 3818, styled, "The Application of East Kentucky Rural Electric Cooperative Corporation for a Certificate of Public Convenience and Necessity to Construct Certain Generating and Related Facilities," in which order the Kentucky Commission stated its policy in respect of such matters.

(1897)

5. The issues involved in this proceeding are local in character, their determination will have no effect on interstate commerce, and it is in the public interest that the determination be made by the Kentucky Commission.

6. Questions within the jurisdiction of the Kentucky Commission exist as to whether the proposed interconnection sought by Paris would result in an encroachment and invasion of the service area of KU in violation of the aforesaid order entered by the Commission in its Case No. 3818, in which it stated its policy in respect of service areas and loads where controversy exists between East Kentucky, its member cooperatives, KU, and other utilities.

7. The Federal Power Commission does not have jurisdiction

1898

of the complaint herein, and the relief sought is not authorized by, and cannot be granted under, the Federal Power Act. Paris is not covered by the Act and has no right to obtain the relief herein sought, because (a) Paris is a political subdivision excluded from the coverage of the Act by Section 201(f); (b) Paris is a municipality operating its own generating, transmission and distribution facilities and is not a "person" under Section 202(b) of the Act; and (c) the Act does not authorize the Federal Power Commission to force KU to use its facilities to transmit energy of a governmental or other public body or to transmit energy generated either by East Kentucky or Paris and sold by one to the other.

ROBERT MATTHEWS
Attorney General

By J. GARDNER ASHCRAFT
Assistant Attorney General
Counsel for the Public
Service Commission of
Kentucky

(1922)

1922

(Filed Apr. 11, 1966)

EAST KENTUCKY
RURAL ELECTRIC COOPERATIVE
CORPORATION
LEXINGTON ROAD
WINCHESTER, KENTUCKY
40391

April 7, 1966

Federal Power Commission
441 G Street, North West
Washington, D. C.

SUBJECT: Docket No. E-7249

Gentlemen:

This will acknowledge receipt of the copy of the complaint in the above matter together with a copy of the order issued March 21, 1966, authorizing East Kentucky to intervene.

This is to inform you that East Kentucky does not wish to intervene in the proceeding; but, will offer any assistance the Commission may request.

Very truly yours,

EAST KENTUCKY RURAL ELECTRIC
COOPERATIVE CORPORATION
H. L. SPURLOCK
H. L. Spurlock, *Manager*

HLS:ct

(1934)

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(Filed May 2, 1966)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. E-7249

CITY OF PARIS, KENTUCKY, *Complainant*

v.

KENTUCKY UTILITIES COMPANY, *Defendant*

Amendment to Answer of Kentucky Utilities Company

1935

The defendant, Kentucky Utilities Company, herein referred to as "KU", for an amendment to its answer to the Complaint herein of the City of Paris, Kentucky, herein referred to as "Paris", states, in the following paragraphs added to those set forth in its original answer, as follows:

28. As set forth in paragraphs 14 and 16 of this answer, KU and Paris render electric service in competition with each other to customers in Paris. The utility business of Paris is not regulated in any respect; and Paris pays no federal, state or local taxes on its utility property or the income therefrom, with the result that electric

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service is furnished by Paris at less than the full cost of electric service. By its Complaint filed herein Paris proposes to evade its own responsibility to install and operate the necessary facilities to furnish the customers served by it with electric service, and seeks to compel an interconnection with the transmission facilities of KU and thereby to

(1937)

take, appropriate and use the transmission facilities and property of KU to serve the customers of Paris, and to subsidize, aid and assist Paris in its unregulated and economically unfair competition with KU. Such interconnection would impose upon KU the cost of installing, maintaining and operating transmission and other facilities, which must continuously have capacity in excess of that required to serve the present and future loads of KU, in order to serve the customers of Paris and to aid and assist Paris' competition with KU; and would be contrary to the interests of the more than 255,000 customers served by KU in Kentucky.

29. KU is engaged in competition with East Ky. in a number of areas throughout Kentucky, but not in the geographical area in and around Paris, Kentucky. In such competition between KU and East Ky. in the generation, transmission, distribution and sale of electric power, East Ky. enjoys competitive advantages, among others, in that East Ky. pays no federal or state income tax and, as set forth in paragraph 26, finances its utility assets and business with funds

1937

borrowed from the Rural Electrification Administration at an interest rate not in excess of 2% per annum, whereas KU pays both federal and state income taxes and finances its business at an overall cost of money in excess of 6%. Under applicable laws of Kentucky and regulations of the Public Service Commission of Kentucky, the Kentucky regulatory agency having jurisdiction in the premises, the City of Paris, Kentucky, is in all respects an electric power customer eligible and suitable for service by KU and not by East Ky., and is rightfully a potential electric power customer of KU and not of East Ky. The use by East Ky. of its generating and transmission or distribution facilities

(1937)

for the purpose of furnishing electric energy to Paris, as provided in Annex C attached to the Complaint of Paris filed herein, would be contrary to the provisions and intent of the Rural Electrification Act, and therefore would be unauthorized and unlawful.

30. The entry of an order establishing the interconnection sought by Paris will violate and be contrary to the provisions of the Commerce Clause of the Constitution of the United States, as set forth in Article I, Section 8, Clause 3.

31. The entry of an order establishing the interconnection sought by Paris will violate and be contrary to the provisions of the Fifth Amendment to the Constitution of the United States for the reason that it will amount to the taking, appropriating and using of

1938

utility property of KU without due process of law and without just compensation.

WHEREFORE: The defendant, Kentucky Utilities Company, requests that the Complaint of Paris be dismissed.

KENTUCKY UTILITIES COMPANY
SQUIRE R. OGDEN
By Squire R. Ogden, Counsel

*Counsel for Kentucky Utilities
Company:*

SQUIRE R. OGDEN
MALCOLM Y. MARSHALL
610 Marion E. Taylor Bldg.
Louisville, Kentucky 40202

RALPH D. STEVENSON
72 West Adams Street
Chicago, Illinois 60603

(1940)

1939

(Filed May 2, 1966)

VERIFICATION

STATE OF KENTUCKY }
COUNTY OF JEFFERSON } ss.

Squire R. Ogden, being first duly sworn, deposes and says that he is an attorney for Kentucky Utilities Company; that as such he has signed the foregoing Amendment to Answer for and on behalf of said corporation; that he is authorized so to do; that he has read said Amendment and is familiar with the contents thereof; and that the matters and things therein set forth are true and correct to the best of his knowledge, information and belief.

SQUIRE R. OGDEN
Squire R. Ogden

Subscribed and sworn to before me
this 29th day of April, 1966.

(SEAL)

MILDRED ROBERTSON
Mildred Robertson
Notary Public,
Jefferson County, Ky.

My commission expires Oct. 22, 1967

1940

(Filed May 2, 1966)

CERTIFICATE OF SERVICE

(2403)

2403

(Filed Aug. 4, 1967)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 525

Docket No. E-7249

CITY OF PARIS, KENTUCKY

v.

KENTUCKY UTILITIES COMPANY

Opinion and Order Directing Physical Connection of
Transmission Facilities and Sale of Electric Energy

2404

APPEARANCES

*Philip P. Ardery and James S. Wilson, Jr., for the City of
Paris, Kentucky.*

*Squire R. Ogden, Malcolm Y. Marshall and Ralph D. Stevenson,
for Kentucky Utilities Company.*

*Wallace E. Brand, for the Staff of the Federal Power
Commission.*

2405

(Issued August 4, 1967)

CARVER, Commissioner:

The City of Paris, Kentucky (Paris) has requested the Commission to order Kentucky Utilities Company (KU) to interconnect its electric transmission facilities with those of Paris in order that Paris may obtain and exchange

(2406)

energy with East Kentucky Rural Electric Cooperative Corporation (East Ky).

Paris owns and operates an electric generation and distribution system. Its five diesel units have an aggregate available generating capacity of 5,467 kw. The peak hourly demand on the City's system was 3,950 kw in 1965 and an estimated 4,200 kw in 1966. The loss of one of its two largest (1360 kw capacity) generators consistent with peak demand would result in a capacity deficiency of an estimated 100 kw in 1966, and presumably more in 1967 and thereafter.

KU is a "public utility" subject to the jurisdiction of the Commission. It owns and operates generating, transmission and distribution facilities throughout Kentucky, serving many wholesale customers, including a number of municipalities.

2406

KU's transmission system is connected with, and its generating plants are operated synchronously with, generating plants owned by others located both within and outside Kentucky, including those of East Ky and Tennessee Valley Authority.

East Ky is an REA financed G and T cooperative which owns and operates two steam generating plants and a system of transmission lines to supply its member cooperatives in central, southern and eastern Kentucky. East Ky's transmission lines are tied to KU's transmission system at some nineteen points. Some of East Ky's loads are served from KU's lines and some of KU's loads are served from East Ky lines.

KU serves that part of the City of Paris and environs not served by the Paris municipal electric system, and op-

(2406)

erates a 69 kv transmission line and a 33 kv transmission line through Paris. KU's 69 kv line is within 1500 feet of Paris' generating station.

The firm power capacity of Paris' system is not adequate. To meet its increased demands, Paris could install additional generating capacity. It could also become a customer of KU and to this end entered into negotiations with KU which were unsuccessful.

A third possibility which led to the instant proceedings was to secure additional energy from East Ky. To this end, it negotiated an agreement with East Ky for the sale and exchange of energy between them. But the nearest facilities of East Ky are 8.7 miles from Paris, and to obviate the necessity for constructing a 69 kv transmission line for that distance, the application for an order from us ordering KU to transmit the energy between them was filed. Since KU is already interconnected with East Ky, the construction of less than 1500 feet of 69 kv line between KU and Paris would physically permit an exchange.

Paris has also asked the Commission to approve its agreement with East Ky.

2407

We hold that the Commission may not grant either of Paris' requests. The Commission has no jurisdiction over the activities of municipalities,¹ or over REA-financed cooperatives which we have held to be a government "instrumentality" under section 201(f) of the FPA.² This Commission does not have to decide whether it can order

¹ Section 201(f).

² *Dairyland Power Cooperative, et al.*, Opinion No. 511, January 5, 1967; Order, *Salt River Project Agricultural Improvement and Power District*, Docket No. E-7306, January 6, 1967.

(2409)

under section 202(b) a public utility to transmit power for the benefit of third parties since it is clear that the Commission cannot compel a private utility to transmit the power of government instrumentalities under Part II of the FPA.³ In view of the foregoing it is not necessary to consider the correctness of Staff's characterization of the proposed arrangement.

2408

This is not to say that this Commission is without the power to enter an order to serve the objectives of Part II of the Federal Power Act. Paris is a "person" within the meaning of section 202(b), and is engaged in the transmission and sale of electric energy.⁴ The Commission may direct an interconnection, and may order KU to provide service directly to Paris pursuant to section 202(b) of the Act. Such action is dependent upon the existence of

³ During the hearing on the forerunners of the Federal Power Act this point was repeatedly made. During the Hearings, before the House Committee on Interstate and Foreign Commerce on H.R. 5423, the following colloquy took place at pp. 397-398:

"Mr. PETTENGILL. Mr. Commissioner, you just said a moment ago that as you construed the bill, a private power line could not be required to carry electric energy generated by the Tennessee Valley Authority or a municipal plant owned by a city, or a State; is that correct?"

"Commissioner SEAVEY. Yes; that is my understanding of the bill."

"Mr. PETTENGILL. Because, as you said, the word 'person' does not include a municipality or a governmental body?"

"Commissioner SEAVEY. I think that municipalities are particularly excluded, and it is my belief that any other Federal agency, any other governmental agency, would be excluded under the terms of the bill."

Similar statements were made by Mr. DeVane during hearings before the Senate. See Hearings, Senate Committee on Interstate Commerce on S. 1725, 74th Congress, 1st Session, at p. 256. The Supreme Court has also recognized this point. *United States v. P.U.C.*, 345 U.S. 295 at p. 313, footnote 23.

⁴ *New England Power Co. v. F.P.C.* 349 F. 2d 258; *U.S. v. P.U.C. of California*, 345 U.S. 295; *California Electric Power v. F.P.C.*, 199 F. 2d 206, cert. denied 345 U.S. 934; *Crisp County*, Opinion No. 508, December 5, 1966.

(2408)

an application, notice to the Kentucky Public Service Commission and KU, an opportunity for a hearing, and a finding that such action is necessary or appropriate in the public interest, that it imposes no undue burden upon KU, and that it does not require the enlargement of KU's generating facilities or impair its ability to render adequate service to its customers. Our authority extends to prescribing terms and conditions, including appointment of costs and compensation.

The record is adequate in all respects. It shows the existence of a proposed rate schedule for secondary energy, subject to KU's right to interrupt supply for not exceeding 400 hours in any period of twelve consecutive months, or 1,000 hours over a period of five years.⁵

2409

KU's willingness to deliver on these terms is in the record. Another consideration is the avoidance of the investment in duplicate facilities, and the avoidance of aesthetic impairment in the area arising from such construction.

Paris may prefer service from East Ky, and may even be willing to pay more for it. But Paris does not contend that we could order such relief, even if we agreed, absent reversal of our own decision in *Dairylane*.

In the course of oral argument Paris moved, and subsequently filed a motion, that the Commission order KU to permit a temporary interconnection with its 69 kv transmission line at a point reasonably proximate to the Paris substation for the purpose of receipts and deliveries of power between Paris and East Ky. Staff filed a response

⁵ It is not the intent of KU to exercise its right of interruption except to the extent that it is required to do so by emergencies on its own system. TR. 380-381.

(2410)

to and concurrence in Paris' motion and KU also filed a response. Thereafter KU filed a motion to strike staff's response and staff filed an answer to KU's motion. Subsequently, KU concurrently filed a motion for leave to file a response to staff's concurrence and a response to which both Paris and staff in turn filed replies.

In view of our opinion and order herein, Paris' motion the purposes for which it requests the temporary interconnection, and the subsequent pleadings filed in relation thereto are all rendered moot.

The Commission further finds:

- (1) Kentucky Utilities Company is a "public utility" subject to the jurisdiction of the Commission.
- (2) The City of Paris, Kentucky, is a "person" within the meaning of section 202(b) of the Federal Power Act and is engaged in the transmission and sale of electric energy.
- (3) The establishment of a physical connection between the transmission facilities of KU and Paris and the sale of energy to Paris is necessary and appropriate in the public interest; it will impose no undue burden on KU nor require the enlargement of KU's generating facilities or impair its ability to render adequate service to its customers.

2410

The Commission orders:

Kentucky Utilities Company shall interconnect its 69 kv transmission line in Paris to the electric facilities of Paris at a point reasonably proximate to the Paris substation as soon as Paris completes the transmission facilities necessary to such interconnection and thereafter shall sell and supply energy to Paris under the rate schedule, as supplemented, offered to Paris and entered in the record as

(2410)

Annex A and Annex B to the Paris complaint and as Exhibit No. 2 of Kentucky Utilities Company.

By the Commission.

(SEAL)

GORDON M. GRANT,
Secretary

2420

(Filed Aug. 23, 1967)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. E-7249

CITY OF PARIS, KENTUCKY, *Complainant*

v.

KENTUCKY UTILITIES COMPANY, *Defendant*

Notice of Compliance

Pursuant to the requirements of § 1.35 of the Rules of Practice and Procedure of the Commission, notice is hereby given that the requirements of the Commission's Order of August 4, 1967, have been met by Kentucky Utilities Company as shown by a letter of August 18, 1967, addressed and mailed to the Mayor of Paris, a copy of which letter and a copy of the Interchange Agreement referred to therein are hereto attached and mailed to the Mayor of Paris with said letter.

Dated at Lexington, Kentucky, August 21, 1967.

KENTUCKY UTILITIES COMPANY
WILLIAM A. DUNCAN
William A. Duncan,
President

2420 A

[CERTIFICATE OF SERVICE]

(2443)

2442

(Filed Aug. 28, 1967)

BEFORE THE FEDERAL POWER COMMISSION

Docket No. E-7249

CITY OF PARIS, KENTUCKY

v.

KENTUCKY UTILITIES COMPANY

Petition of Paris for Rehearing

Petitioner Paris hereby applies for rehearing in the above-captioned matter and states:

1. On the second of February, 1967, presiding examiner's initial decision of formal complaint in this matter was handed down. Thereafter exceptions were duly filed and the proceeding, after briefing and oral argument, was submitted for decision by the Commission. On the fourth day of August, 1967, the Commission issued Opinion No. 525 and an order denying the relief requested by Paris and directing physical connection of the Paris system to the transmission facilities of Kentucky

2443

Utilities Company (KU) and for sale and exchange of electric energy by KU and Paris under terms and conditions of a proposed contract as supplemented, which proposed contract and supplement are entered in the record as Annex A and B to the complaint and as Exhibit No. 2 of KU. The basis of the Commission's decision was that it considered itself powerless to grant the relief requested by Paris because of its previous holdings:

Dairyland Power Cooperative, et al., Opinion No. 511, January 5, 1967; Order, Salt River Project Agricultural Improvement and Power District, Docket No. E-7306, January 6, 1967,

(2443)

and a further holding that the Commission "cannot compel a private utility to transmit the power of government instrumentalities under Part II of the FPA."

2. *Specifications of Errors*

Specification No. 1—Paris specifies as error in the Commission's opinion and order that the *Dairyland* and *Salt River* cases, *supra*, are patently in error. Cooperatives financed in part by loans from the Rural Electrification Administration, are in nowise "instrumentalities of the United States." If they are in truth instrumentalities of the United

2444

States, then as one consequence they cannot be regulated or in anywise taxed by the states. *Mayo v. United States* 319 U.S. 441 (1943). In this case it was held that absent specific authorization by Congress, states are powerless to regulate or tax instrumentalities of the United States. Judicial notice should suffice to show that taxation and regulation of REA cooperatives by the states is common throughout the country.

The error in the *Dairyland* and *Salt River* decisions is further made clear by the decision issued by this Commission August 4, 1967, in the case of *Buckeye Power, Inc.* and *Ohio Power Co.*, Docket No. E-7355, wherein this Commission retained certain jurisdiction over a cooperative organization owned in part by rural electric cooperatives, which in turn were financed by loans from the Rural Electrification Administration. Read together with *Dairyland* and *Salt River*, the *Buckeye* case offers rural electric coops the benefits as well as the responsibilities of regulation by FPC if they operate indirectly, through another cooperative. But the same benefits and responsibilities do not result if the relationship is direct. This Commission has made no effort to reconcile this inconsistency between the

(2446)

Buckeye case on the one hand and *Dairyland, Salt River* and the instant case on the other.

2445

Specification No. 2—The Commission's opinion and order is also in error in holding that it cannot require a public utility to transmit power of instrumentalities of the United States under Part II of the FPA. The presiding examiner in this case stated otherwise in his opinion and order and the full Commission did not appear to overrule anything the presiding examiner had to say. In the examiner's opinion it is stated:

“Nothing contained in a Paris-KU service agreement would be permitted by the Commission to deny to, or to in any way interfere with, Paris' rights to SEPA power if it becomes available to Paris.”

Furthermore, the decision of the Commission is inconsistent with the decision of the Commission handed down in *Crisp County Power Commission v. Georgia Power Co.* Docket No. E-7120, FPC Opinion No. 508, issued December 5, 1966. In the *Crisp County* case, Georgia Power was required by order of the Commission to interconnect with Crisp County and the Commission said “the contract establishes one interconnection point at the Warwick substation, through which Crisp County can receive maintenance energy, emergency energy, replacement energy and possible SEPA power from Georgia Power system.”

2446

These two recognitions of the authority of the Commission to direct an investor-owned company to allow use of its facilities for exchange of power produced by an instrumentality of the United States (SEPA) are in clear-cut contradiction with the decision in the instant case.

Specification No. 3—The Commission's opinion and order is also in error as indicated in the opinion's words: “Paris

(2446)

may prefer service from East Kentucky, and may even be willing to pay more for it. But Paris does not contend that we could order such relief, even if we agreed, absent reversal of our own decision in *Dairyland*."

The foregoing is not a correct statement. It is Paris' position that the responsibility placed upon the Commission to promote and encourage coordination of facilities for the generation, transmission, and sale of electric energy provided by § 202(a) of the Federal Power Act warrants acceptance for filing of the contract between East Kentucky and Paris, that contract having been voluntarily offered for filing by East Kentucky. Under § 202(b) the Commission has power to order KU to allow interconnection to facilitate power exchanges between Paris and East Kentucky provided in the contract. Nonetheless we

2447

admit that so long as *Dairyland* stands the Commission cannot by order give direction to East Kentucky.

WHEREFORE Petitioner respectfully requests that the Commission vacate its order and modify its opinion, No. 525, to overrule the *Dairyland* case and cases following the same, and to order the relief requested in the complaint.

Respectfully submitted,

PHILIP P. ARDERY

Philip P. Ardery

Brown, Ardery, Todd & Dudley
906 Kentucky Home Life Building
Louisville, Kentucky 40202

JAMES S. WILSON, JR.

James S. Wilson, Jr.

Paris, Kentucky

Counsel for Paris

(2449)

2448

(Filed Aug. 28, 1967)

VERIFICATION

Commonwealth of Kentucky }
County of Jefferson } ss

Philip P. Ardery, being first duly sworn, on oath says that he is the attorney for the Petitioner, Paris, that he signed the foregoing Petition, being duly authorized by Paris, and that he has read the same, knows the contents thereof and that the same are true to the best of his knowledge and belief.

PHILIP P. ARDERY
Philip P. Ardery

Subscribed and sworn to before me this 24th day of August, 1967.

My commission expires: Oct. 31, 1967.

JEAN McCUALEY
Notary Public,
Jefferson County,
Kentucky.

2449

CERTIFICATE OF SERVICE

(2446)

may prefer service from East Kentucky, and may even be willing to pay more for it. But Paris does not contend that we could order such relief, even if we agreed, absent reversal of our own decision in *Dairyland*."

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Respectfully submitted,

PHILIP P. ARDERY

Philip P. Ardery

Brown, Ardery, Todd & Dudley

906 Kentucky Home Life Building

Louisville, Kentucky 40202

JAMES S. WILSON, JR.

James S. Wilson, Jr.

Paris, Kentucky

Counsel for Paris

(2449)

2448

(Filed Aug. 28, 1967)

VERIFICATION

Commonwealth of Kentucky }
County of Jefferson } ss

Philip P. Ardery, being first duly sworn, on oath says that he is the attorney for the Petitioner, Paris, that he signed the foregoing Petition, being duly authorized by Paris, and that he has read the same, knows the contents thereof and that the same are true to the best of his knowledge and belief.

PHILIP P. ARDERY
Philip P. Ardery

Subscribed and sworn to before me this 24th day of August, 1967.

My commission expires: Oct. 31, 1967.

JEAN McCUALEY
*Notary Public,
Jefferson County,
Kentucky.*

2449

CERTIFICATE OF SERVICE

(2452)

2452

(Filed Sept. 19, 1967)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, and John A. Carver, Jr.

Docket No. E-7249

CITY OF PARIS, KENTUCKY

v.

KENTUCKY UTILITIES COMPANY

Order Denying Rehearing

(Issued September 19, 1967)

On August 28, 1967, the City of Paris, Kentucky, and on August 30, 1967, Kentucky Utilities Company filed applications for rehearing of our Opinion No. 525 and Order issued August 4, 1967, in the above-entitled proceedings.

The applications for rehearing filed by the City of Paris, Kentucky and by Kentucky Utilities Company set forth arguments that were previously made and were fully considered in the original opinion. No facts or legal principles have been raised that would warrant any change in or modification of the Commission's Opinion No. 525 and accompanying order.

The Commission orders:

The applications for rehearing filed herein are denied.
By the Commission.

(SEAL)

KENNETH F. PLUMB,
Acting Secretary.

DC 25



BRIEF FOR PETITIONER

IN THE

United States Court of Appeals

For the District of Columbia Circuit

No. 21373

CITY OF PARIS, KENTUCKY, - Petitioner,

versus

FEDERAL POWER COMMISSION, - Respondent,
KENTUCKY UTILITIES COMPANY, - Intervenor.

On Petition to Review an Order of the
Federal Power Commission.

United States Court of Appeals

for the District of Columbia Circuit

FILED JAN 25 1968

PHILIP P. ARDERY,
BROWN, ARDERY, TODD & DUDLEY,
Kentucky Home Life Building,
Louisville, Kentucky 40202

Nathan J. Vanlou
CLERK

JAMES S. WILSON,
Paris, Kentucky,
Counsel for Paris, Kentucky.

WESTFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.



QUESTIONS PRESENTED.

1. Whether an electric cooperative association financed by REA is an instrumentality of the United States and exempt from Federal Power Commission authority under § 201(f) of the Federal Power Act.
2. Whether an REA financed cooperative owning transmission facilities and engaging in sales of power, wholesale for resale in interstate commerce is a utility within the meaning of § 201(e) of the Federal Power Act.
3. If a rural electric cooperative is an "instrumentality" whether the Federal Power Commission has jurisdiction to order an investor company to allow a city to interconnect with the investor company's transmission system to facilitate power exchanges between the city and the cooperative.

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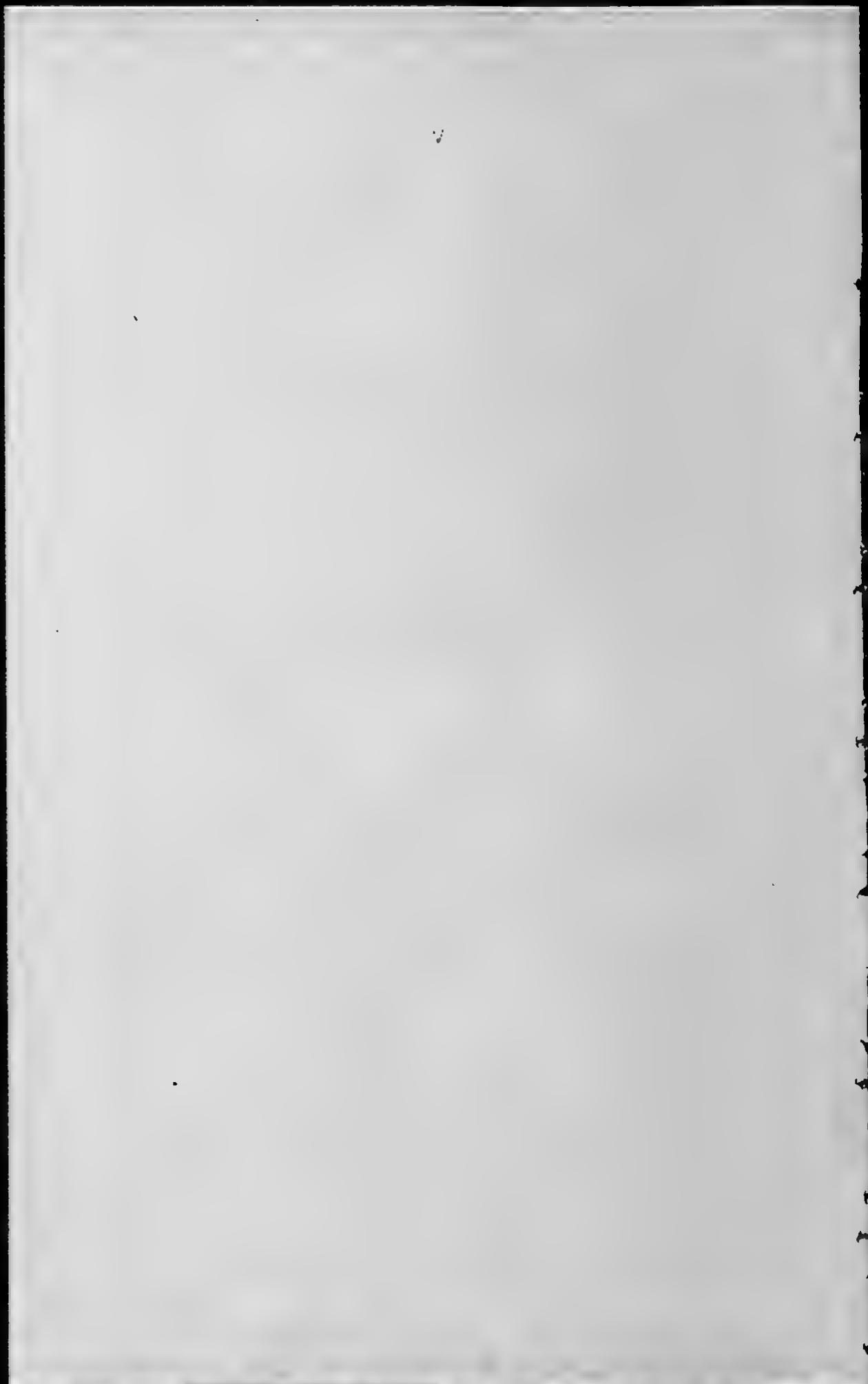
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IN THE
UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21375

CITY OF PARIS, KENTUCKY, - - - *Petitioner,*

v.

FEDERAL POWER COMMISSION, - - - *Respondent,*
KENTUCKY UTILITIES COMPANY, - - - *Intervenor.*

ON PETITION TO REVIEW AN ORDER OF THE
FEDERAL POWER COMMISSION.

BRIEF FOR PETITIONER.

JURISDICTIONAL STATEMENT.

Jurisdiction and venue are based upon Section 313 (b) of the Federal Power Act.¹

On October 7, 1965, the City of Paris (Paris) filed a complaint with the Federal Power Commission against Kentucky Utilities Company (KU), seeking an order under § 202(b) of the Federal Power Act² directing KU to allow Paris to interconnect with its transmission system. Paris was seeking the use of this interconnection to facilitate a power exchange

¹49 Stat. 860 (1935), as amended, 16 U.S.C., § 8251(b) (1958).
²16 U.S.C. § 824m(b).

agreement with East Kentucky Rural Electric Cooperative Corporation (East Kentucky) whose system was interconnected with KU at nineteen points. The Federal Power Commission held that it was without jurisdiction to grant relief to Paris, relying on the *Dairyland* and *Salt River* cases.³ The Commission held East Kentucky an instrumentality of the United States, exempt from Commission jurisdiction under § 201(f) of the Federal Power Act, which subsection also exempts municipalities and stated that it was without authority to compel KU to allow the use of its transmission system for the purpose requested by Paris.⁴

The basic pleadings which disclose the basis of petitioner's contention that the Commission had jurisdiction and this Court has jurisdiction to review the Commission's decision began with the complaint filed October 7, 1965 by Paris (R. 1788). The Commission served a copy of the complaint on KU and KU filed its answer (R. 1880 and 1881). The Kentucky Public Service Commission filed a notice of intervention (R. 1895), but did not participate in the hearings.

The substance of the Paris complaint was that it was a fourth class city in Kentucky, that KU was a public utility company subject to Commission jurisdiction, that Paris owned its own electric distribution system together with some small diesel generating

³*Dairyland Power Cooperative, et al.*, Opinion No. 511, January 5, 1967, 37 FPC 12; *Order, Salt River Project Agricultural Improvement and Power District*, Docket No. E-7306, January 6, 1967, 37 FPC 62.

⁴The Opinion of the Commission appears in this brief as Appendix A and in the record at page 2403. All record citations herein are to the certified transcript pagination contained in the "Certificate of Record in Lieu of Record" filed with the Court by the Federal Power Commission on December 7, 1967.

units, that Paris had made an unsuccessful effort to negotiate a power exchange agreement with KU for many months, and that thereafter it did succeed in negotiating a power exchange agreement with East Kentucky whose transmission system was operated on a pooled basis with KU, centrally dispatched and interconnected at numerous points.⁵

Paris asked that its contract with East Kentucky be filed and that KU be directed to permit interconnection by Paris with a KU transmission line running through the city to eliminate construction otherwise necessary for the interchange. KU's answer (R. 1881) was largely a denial that the Commission had jurisdiction over it as a utility and denial that the Commission had any authority under § 202(b) of the Act to order such an interconnection. It did offer to interchange power with Paris on whatever terms and conditions the Commission deemed proper.

On February 2, 1967 the presiding examiner issued his initial decision (R. 1997) in which he held the Commission without power to grant the relief requested by Paris. He did find that KU was a public utility as defined in the Act, that Paris was a person as defined in the Act, but relied upon the *Dairyland* decision in saying the Commission had no jurisdiction to grant the relief requested. The examiner, however, ordered interconnection, Paris to KU, for purpose of carrying out a proposal made by KU to interchange power with Paris.

⁵The Commission Opinion in this case notes there are nineteen points of interconnection between the East Kentucky and KU transmission systems.

Paris (R. 2036) as well as KU (R. 2078) filed exceptions to the presiding examiner's decision. The matter was briefed and argued before the full Commission and the Commission issued its decision August 4, 1967 (R. 2403) in which it was again held that FPC was without power to grant the relief requested by Paris. The order did direct interconnection, Paris to KU, for power exchange between Paris and KU. Subsequently the interconnection was made and a notice of compliance was filed August 27, 1967 by KU (R. 2420). Both Paris (R. 2442) and KU (R. 2450) petitioned rehearing and rehearing was denied (R. 2452).

The statutory provisions believed to sustain jurisdiction before FPC are §§ 201, 202, 205, 206, 207, 301, 302, 303, 306, 307, 309, 311 of the Federal Power Act. The statutory provision believed to sustain jurisdiction in this Court is § 313(b) of the Federal Power Act.*

STATEMENT OF THE CASE.

As previously stated, this proceeding began with the filing of Paris' complaint, October 7, 1965 (R. 1788). Paris, a municipality, alleged that KU was a utility subject to Commission jurisdiction and that Paris had for many months sought unsuccessfully to work out a power exchange agreement with KU, using an interconnection to be established between the Paris system and a KU transmission line running through the town. After failing to reach agreement with KU,

*The above cited sections of the Federal Power Act are printed as Appendix B hereto.

Paris did reach a satisfactory power exchange agreement with East Kentucky, but East Kentucky's Transmission line was some eight miles from Paris. Paris alleged the East Kentucky and KU systems were interconnected at numerous points and that they were in effect operated as a single system, centrally dispatched by a dispatching station owned and operated by KU. Thus Paris asked FPC to require KU to permit interconnection with KU inside the city for power exchange with East Kentucky. Paris alleged this would eliminate necessity of construction of approximately eight miles of transmission line by the city to the transmission line owned by East Kentucky. It alleged that the transmission line eliminated would save approximately \$78,000.00 and that to build a line to East Kentucky's system would constitute wasteful and unnecessary duplication of the existing facilities of KU. Paris also alleged that KU had ample capacity in its transmission line to provide the service without jeopardizing KU's service to its existing customers. Relief was requested under § 202(b) and related parts of the Federal Power Act. Paris also asked FPC approval of its contract with East Kentucky.

KU, in its response, denied that the Commission had authority to grant the relief requested and offered to exchange power with Paris.

The issues in this case are largely issues of law concerning the authority of the Commission under the Federal Power Act. There are, we believe, no essential points of difference between the parties as to the facts.

STATUTES INVOLVED.

The statutes involved are the above-cited sections of the Federal Power Act printed as Appendix B.

STATEMENT OF POINTS.

The Commission in its decision held itself without jurisdiction over municipalities, or "over REA-financed cooperatives which we have held to be a government 'instrumentality' under § 201(f) of the Federal Power Act."

Point 1: Petitioner submits the Commission erred in its finding that an REA-financed cooperative is a government instrumentality under § 201(f) of the Federal Power Act and in its failure to find such a cooperative a public utility.

The Commission in its Opinion also held it was without authority to "compel a private utility to transmit the power of government instrumentalities under Part II of the Federal Power Act."

Point 2: Petitioner submits that the Commission erred in holding it could not compel KU to interconnect with Paris to facilitate exchanges of power between East Kentucky and Paris.

SUMMARY OF ARGUMENT.

The decision in this case relies almost totally on the *Dairyland* decision. The *Dairyland* decision is unclear, to say the least, and some aspects of its lack of clarity leave serious questions. Does *Dairyland* really

hold rural electric cooperatives beyond the protective power of FPC because they are instrumentalities of the federal government as the Commissions words state,⁷ meaning a part of the executive branch of the government, or does *Dairyland* hold they are instrumentalities of Congress, as appears in the words of the Opinion at another point,⁸ or does it hold the Commission has no jurisdiction over them not because they are not specifically exempt under § 201(f) of the Act but because they are not "public utilities" as defined by § 201(e) of the Act? There are further words to this effect.⁹

FPC Chairman White in a separate concurring statement apparently did not adopt either the majority's conclusion that coops are instrumentalities under § 201(f), nor the conclusion of dissenting Commissioner Bagge that coops are "public utilities" as defined in § 201(e). He appears to feel that coops are nonjurisdictional because he believes the Commission was never "intended to operate in an area in which another federal agency has been granted major responsibilities."¹⁰ He does not specifically say whether he believes Congress' enactment of the Rural Electrification Act works implied repeal of part of the Federal Power Act.

Petitioner here contends it is improper to leave the water muddy to the extent that no one knows what kind of an "instrumentality" a cooperative is and to cast

⁷87 FPC 12 at 17.

⁸87 FPC 12 at 18.

⁹87 FPC 12 at 26.

¹⁰87 FPC 12 at 29.

further doubt as to whether the "instrumentality" question is important after all because maybe Congress just didn't intend coverage of coops by the Federal Power Act. Or again, if it did, the REA Act worked a partial repeal. Further, the difficulty is made worse by dropping here and there throughout the Opinion and Dissenting Opinion arguments pro and con on the point of whether coops are "utilities" as defined by § 201(e) of the Federal Power Act.

Petitioner contends that the language of the Act is sufficiently clear as to make analysis of its legislative history unnecessary, but if that history is examined we feel it supports our contentions here. We also contend the administrative history of the Federal Power Act in relation to the Rural Electrification Act supports granting the relief requested and that the great preponderance of pertinent circumstances indicate East Kentucky is not an "instrumentality" but is in fact a "utility" within the meaning of the Federal Power Act. We further say that the sum and effect of the Commission's holding is to reopen the "Attleboro gap"¹¹ which was thought to have been completely closed by passage of Parts II and III of the Federal Power Act.

Finally, the petitioner here also contends that even if East Kentucky is an "instrumentality" the Commission still has power under § 202(b) to grant relief to Paris seeking an interconnection with KU for power exchange with East Kentucky.

¹¹See *Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Co.*, 273 U. S. 83 (1927).

ARGUMENT.**I**

**The Language of the Statute Is Clear and Predominant
Facts Imply Cooperatives Are Not "Instrumentalities"
But Are "Utilities."**

It is a well known principle that where the language of the statute is clear it is not appropriate to resort to legislative history in interpreting it.¹³

In *United States v. Public Utilities Commission*¹² the Supreme Court held FPC was exclusively empowered to regulate wholesale sales of hydro power produced under Part I of the Federal Power Act. The majority opinion was heavily involved with the history of the Act but Mr. Justice Jackson, separately concurring, made what we submit was a very pertinent observation when he said:

"I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute, but creation of a statute."¹⁴

¹²*Caminetti v. United States*, 242 U. S. 470 (1917); *Osaka Shosen Kaisha Line v. United States*, 300 U. S. 98 (1937); *United States v. Oregon*, 366 U. S. 643 (1961).

¹³345 U. S. 295 (1953).

¹⁴345 U. S. at 319.

Here the main language we are concerned with is that of §§ 201(e) and 201(f). The former defines public utility as "any person who owns or operates facilities subject to the jurisdiction of the Commission under this part." Section 201(f) exempts from Commission jurisdiction "the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is *wholly owned*, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes such specific reference thereto." (Emphasis Added.)¹⁵

We believe the words *wholly owned* make clear the sense of Congress in enacting the foregoing subsection. The words of the Act carry their own clear meaning. If the coops were wholly owned by the United States or any of its agencies it was the intent of Congress to exempt them. But the fact is that the coops are wholly owned by their members and no part of a rural electric cooperative is owned by the United States or any agency thereof.

The Court of Appeals for the 9th Circuit in 1958 had before it the question of whether a rural electric coop was an agency of the United States government. In denying that the coop was an agency of the United States government the Court said:

"The electric association is not an agency of the United States Government simply by virtue

¹⁵16 U.S.C. 824(f).

of an 'arrangement' with the Rural Electrification Administration pursuant to 7 U.S.C.A. §§ 901-915. The Rural Electrification Administration is the governmental agency. The associations to whom it provides funds and other assistance are not. By no concept or canon of construction can the recipient of federal aid in this situation be considered a 'government instrumentality' and therefore immune from local taxation under the supremacy clause of the Constitution whereby the federal government protects the instrumentalities which it has constitutionally created."¹⁶

Similarly Kentucky's highest court in 1943 held a legislative effort to grant ad valorem tax immunity to rural electric cooperatives was invalid under the state's constitution. The legislature's attempted exemption covered a number of types of taxes and authorized in lieu payments by cooperatives of ten dollars annually. The court said the coops' property was not "public property" within the meaning of the Kentucky Constitution but was private property owned by the coop members and therefore subject to ad valorem tax.¹⁷

By contrast, it is clear that unless there is specific congressional authorization, states may not regulate or tax instrumentalities of the United States. *Mayo v. United States* 319 U. S. 441 (1943). In this case the court held that Florida was without power to require the United States to pay an inspection fee on

¹⁶*City of Anchorage v. Chugach Electric Association*, 252 F. 2d 412 (9th Cir. 1958) at 419.

¹⁷*Inter-County Rural Electric Cooperative Corporation v. Reeves*, 294 Ky. 458, 171 S. W. 2d 973 (1948).

fertilizer distributed by the federal government as part of its soil building program. The court, speaking through Justice Reed, held that absent specific authorization by Congress, a state is powerless to regulate or tax an instrumentality of the United States.

Citing the *Mayo* case, the 9th Circuit held the Atomic Energy Commission beyond the power of local regulation in *Maun v. United States* 347 F. 2d 970 (9th Cir. 1965). Here AEC wanted to run transmission lines through two California towns in disregard of the local zoning authority and the court upheld the sovereign immunity of the Commission as an instrumentality of the United States.

The Committee on Government Operations of the United States Senate recently compiled information about state regulatory commissions. This compilation indicated that of forty-five responding state commissions, sixteen regulate the wholesale rates of cooperatives and seventeen regulate their retail rates.¹⁸ This, we suggest is some indication of what the states think about rural electric cooperatives and their status as "instrumentalities" of the United States.

Chairman White, as has been said, bottoms his separate opinion on the thought that FPC was not "intended to operate in an area in which another federal agency has been granted major responsibilities." This logic appears to be part of the rationale underlying the majority opinion. But no real effort is made by the majority or Chairman White to reconcile this principle with the fact that there has been over-

¹⁸90th Congress, 1st Session, State Utility Commissions, Committee on Government Operations, United States Senate, pp. 23, 24.

lapping federal regulation in the utility field for years. The FPC under the Federal Power Act, the SEC under the Public Utility Holding Company Act, the AEC under the Atomic Energy Act, the Department of Justice and the Federal Trade Commission under the antitrust laws, the Department of Interior under the various power acts, overlap at many points. There is no mystery about the overlapping, and until now there has been very little thought that "Congress never intended" the overlap.

A perfect example of this is to be found, as Commissioner Bagge knew, in the *El Paso Natural Gas* case.¹⁹ Here El Paso Natural Gas Company acquired the stock of a pipeline company and then sought FPC approval of acquisition of the company's assets under § 7 of the National Gas Act.²⁰ At that time Justice had commenced action against El Paso alleging a Clayton Act violation. El Paso moved to dismiss the antitrust action and its motion was denied, the Supreme Court then denied certiorari.²¹ FPC authorized the merger and the District of Columbia Circuit affirmed.²² The Supreme Court then reversed holding the FPC should have withheld action pending determination of the antitrust action.

The particularly noteworthy point of the *El Paso Natural Gas* case is the fact that the Natural Gas Act like the Federal Power Act and the Rural Electrification Act is silent about the role of the other "overlapping" government agency.

¹⁹California v. Federal Power Commission, 369 U. S. 482 (1962).

²⁰15 U.S.C. § 717f(c).

²¹355 U. S. 950 (1958).

²²111 App. D. C. 226, 296 F. 2d 348 (D.C. Cir. 1961).

With respect to the definition of public utility, it is clear that East Kentucky owns transmission facilities which are part of the same interstate network as KU and it is also undenied that these facilities are used for the sale of electric energy, wholesale for resale in interstate commerce. Section 201(a) declares the business of "transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce . . ." is subject to Commission regulation.²³

The many inconsistencies in the *Dairyland* case leave numerous unsolved questions. Did the Commission, for example, believe that the coops were instrumentalities of the United States because they borrowed money from an agency of the United States? There is much in the opinion to suggest this was the basis of the holding. It is on this point, however, to be remembered, that in the period of its existence, REA has loaned funds to many investor companies always exercising the same supervision over these companies' loans as it exercises over the coops.²⁴

If a coop becomes an instrumentality of the United States by virtue of borrowing money from REA then why does not an investor company likewise become an instrumentality as a consequence of such borrowing?²⁵

²³16 U.S.C. § 824(a).

²⁴Records of the Department of Agriculture indicate REA loans have been made to such power companies as Arkansas Power & Light, Florida Power Corporation, Georgia Power & Light Co., Central Iowa Power Co., Missouri General Utilities Co., Montana-Dakota Utility Co., as well as many others. See *Annual Statistical Report of REA Borrowers* (1962).

²⁵The *Dairyland* opinion says cooperatives, "are instrumentalities chosen by Congress for the purpose of bringing abundant, low cost electric energy to rural America." If the mere fact that it took passage of

(Footnotes continued on following page)

Is the fact of non-profit operation the reason the Commission found the coop in *Dairyland* to be an instrumentality? Some language in *Dairyland* seems to imply so. If so, then why did the Commission retain jurisdiction over a non-profit, cooperative type organization put together by a group of rural electric cooperatives working in conjunction with the Ohio Power Company? In *Buckeye Power, Inc.* and *Ohio Power Co.*, Docket No. E-7355, August 4, 1967, the Commission retained jurisdiction over a non-profit operation which was in part financed by reserve funds of rural electric cooperatives. How can this retention of jurisdiction be squared with the *Dairyland* holding? And if non-profit operation is to be the basis of FPC's refusal to accept jurisdiction, what does this imply so far as the large power pools now forming go? Most of them operate non-profit.²⁶

the REA act to bring coops into existence makes the coops "instrumentalities" of the United States, might not we say with equal logic that the legislature of Kentucky in enacting the general corporation law of that state—the law under which Kentucky Utilities is incorporated—has chosen KU as its instrumentality to bring power to its customers? Thus KU is an "instrumentality" of the state of Kentucky and also exempt under § 201(f).

²⁶In 1964 the then FPC Chairman Joseph Swindler, responding to a request from the Senate Commerce Committee on S. 2028, a bill specifically exempting "any nonprofit cooperative" from Commission regulation said:

"The bill as drafted would exempt from possible Commission regulation 'any nonprofit cooperative,' regardless of the source of its funds. Thus, investor-owned utilities presently subject to our jurisdiction could establish subsidiaries incorporated as nonprofit cooperatives which would be wholly outside the pattern of regulation which Congress provided in parts II and III of the Federal Power Act as part of the Public Utility Holding Company Act of 1934.

"The question is raised as to whether Congress would wish to leave such entities free to charge their wholesale customers unjust or unreasonable rates, or to discriminate between classes of customers, or to fail to interconnect with municipal or rural cooperative distribution systems they do not choose to serve." Hearing on S. 2028 and 2038 Before the Senate Commerce Committee, 88th Cong. 2nd Sess. P. 2.

If, as Chairman White says, it is simply a matter that "Congress never intended" to allow FPC to regulate coops, how does the simple absence of Congressional intent work out to exempt coops? The Supreme Court in the *Colton* case²⁷ held that FPC had jurisdiction over all sales of electric energy "not expressly exempted by the act itself." Chairman White lets a simple absence of intent on the part of Congress work exactly opposite to the holding of the Supreme Court in *Colton*.

Another argument that has been made is that the coops are really not utilities because they don't "hold themselves out" to provide service to the public. This flies squarely in the face of the holding of the Colorado Supreme Court in the case which brought Salt River to the D. C. Circuit.²⁸ The Colorado court flatly rejected the argument that the coops are cozy little operations serving only their own members and, therefore, not public utilities.

At this point it is to be noted that the cooperative involved in the instant case, East Kentucky, is organized under Chapter 279 of the Kentucky Revised Statutes, the Kentucky Cooperative Enabling Act. This Act specifically empowers Kentucky rural electric coops to provide service to non-members "to the extent of not more than 25%" of total business. KRS 279.120. The Kentucky Statutes also provide "all carriers or conveyors of electricity or electric power are declared

²⁷*Federal Power Commission v. Southern California Edison Co.*, 376 U. S. 205 (1964).

²⁸*Western Colorado Power Company, et al. v. Public Utilities Commission of Colorado, et al.*, Colo., 411 P. 2d 785, cert. den. 385 U. S. 22 (1966).

to be common carriers and subject to the obligations incident thereto." KRS 278.020. This of course includes KU, here steadfastly denying the use of its transmission system to Paris for purposes of facilitating the exchange agreement between Paris and East Kentucky.

As further indication of the weakness of the argument that rural electric coops are not public utilities because they do not "hold themselves out" to offer service to the public as a whole, it has been determined that even in states where coops may legally serve their members only, anyone in the service area of a coop can force the coop to give it membership.²⁹ Not only have courts granted injunction forcing coops to admit persons seeking service to membership, they have also allowed punitive damages against a rural electric coop for failure to serve.³⁰

Commissioner Bagge in his dissent in *Dairyland* has wisely commented:

"Since 1935 the Nation has witnessed the development of huge interstate power grids and interstate power pooling operations, mine mouth and nuclear generation. Federal regulation has accordingly followed these changes in structure and technology insofar as the investor-owned utilities are concerned. The fledgling cooperative electric systems as they existed in 1935 have kept pace with these changes. The establishment of large generating and transmission combines such as *Dairyland*

²⁹*Capital Electric Power Association v. McGuffee*, Miss., 83 So. 2d 837 (1955).

³⁰*Capital Electric Power Association v. Hinson*, Miss., 92 So. 2d 867 (1957).

and Minnkota operating in interstate commerce is part of the cooperative's response to that technology. The issue here is whether the pattern of federal regulation contemplated by Congress should not follow the same changes in structure and technology of the cooperatively owned utilities as it has with regard to investor-owned utilities."

It is interesting in the case at bar to note that consistent with what Commissioner Bagge says about the large and important role presently being played by generation and transmission cooperatives, Mr. William A. Duncan, President of KU has also made relevant comment. Mr. Duncan has made rather strong complaint to various congressional committees concerning the activities of the generation and transmission cooperatives in Kentucky, including the provision of coop service to a vast industrial complex in Western Kentucky as well as efforts to coordinate power supply between coops and cities such as Paris. He appears to feel, like Commissioner Bagge, that the rural electric cooperatives are not a simple little self-help operation any more.²¹

²¹See Hearings before the Committee on Agriculture, House of Representatives, Eighty-ninth Congress, Second Session on H.R. 14000, H.R. 14048, H.R. 14837 and H.R. 15162, P. 621, *et seq.*; Hearings before Subcommittee of the Committee on Agriculture and Forestry, United States Senate, Eighty-ninth Congress, Second Session on S. 3337, S. 3720, P. 497, *et seq.*; and Hearings before the Committee on Agriculture, House of Representatives, Ninetieth Congress, First Session on H.R. 1400, H.R. 1401, H.R. 1402, H.R. 3121, H.R. 3314, H.R. 6026 and H.R. 7306, P. 281, *et seq.*

II

The Congressional and Administrative History of the Federal Power and Rural Electrification Acts Imply FPC Jurisdiction Over Cooperatives.

Commissioner Bagge, in his *Dairyland* dissent, has reviewed the congressional history of the Federal Power and Rural Electrification Acts in a way it is difficult to improve upon. His detailed analysis brings him to say:

“To conclude that legislative history supports the contention that Congress in enacting the Rural Electrification Act evidenced an intent to transfer all regulatory authority with respect to cooperatives from this Commission to the Administrator is historical nonsense.”⁸²

Our review of the legislative history does indicate at many points a Congressional attitude that instrumentalities of the United States would not be regulated, but there is no indication whatsoever that rural electric cooperatives were conceived to be government instrumentalities. As a typical example of the kind of government instrumentalities Congress was thinking of, there is a colloquy between Senator Hastings and Mr. DeVane, the principal author of Parts II and III of the Federal Power Act, going into this point where the Senator asks:

“Do you undertake to regulate the power created by Tennessee Valley Authority?

⁸²87 FPC 12 at 87.

"No, sir. The bill provides for voluntary co-ordination under the supervision and direction of the Commission of the privately and publicly owned electric facilities in the several districts, and as to the privately owned facilities the Commission is given authority to require physical connection and the purchase sale or interchange of power."²³

All of the discussions relating to instrumentalities of the United States, as stated in § 201(f), were of those *wholly owned*, directly or indirectly by the government. TVA and the other strictly public power activities of the United States government all qualify, but the way they qualify is that they are *wholly owned* by the government and not by private individuals as are cooperatives. Here note again Mr. DeVane's comment turned on private versus public ownership.

Another analysis of the legislative history of § 201(e) and its definition of public utility implies very clearly that it was Congress' intent to have the term public utility broad enough to cover any kind of an organization which "owns and operates facilities" of the type regulated by the Commission.²⁴ The General Counsel of Federal Power Commission quite correctly, we think, concluded that the definition of "public utility" as used in the Federal Power Act is controlled by *the type of facilities operated and not the type of organization which operates the facilities*.

²³Hearings before the Committee on Interstate Commerce, United States Senate on S. 1725, 74th Congress, 1st Sess. P. 257, 258.

²⁴See General Counsel's Opinion dated May 20, 1963, Appendix C herein, P. 23a *et seq.*

With respect to administrative interpretations by the Federal Power Commission since the enactment of the Federal Power and Rural Electrification Acts, the statements made in the FPC Counsel's opinion, *supra*, are much more convincing to the effect that the Commission on numerous occasions exercised jurisdiction over cooperatives than is the contrary statement in the opinion in *Dairyland*. The majority opinion in *Dairyland* states:

" . . . we think it significant that over the past thirty years since enactment of Part II of the Federal Power Act, there has not been a single instance where this Commission decided that cooperatives are jurisdictional."²⁵

The General Counsel in his opinion concludes that since 1947 the Commission has asserted jurisdiction over rural electric cooperatives in numerous proceedings. He points out that in one case, *Black Hills Power and Light Co. and Rushmore G & T Electric Cooperatives, Inc.*, 10 FPC 864 (1951), the Commission quite specifically made a finding of jurisdiction by overruling the coop's motion to dismiss for want of jurisdiction.

To reiterate, we submit there is nothing in the Congressional history of the Federal Power or Rural Electrification Acts to imply either that rural electric coops were intended to be within the specific exemption § 201(f) provides for instrumentalities of the United States, nor outside the definition of "public utility" as given by § 201(e).

²⁵87 FPC 12 at 25.

We further believe that it is wholly improper to say the REA Act is an implied repealer of the Federal Power Act and we disagree with the Commission's *Dairyland* comment brushing off the *Borden* case,²⁶ as having been clearly limited by the Supreme Court. *United States v. Zacks*, 375 U. S. 59 (1963). The *Zacks* case simply explained the *Borden* case and quotes with approval the famous statement, ". . . repeals by implication are not favored. When there are two acts upon the same subject the rule is to give effect to both if possible." The court, in the next sentence says: "The correctness of this statement is not to be doubted."²⁷

The court in the *Zacks* case held that a retroactive amendment to the tax code *did not repeal* a statute of limitations. Headnote 4 of the reported opinion in *Zacks* quotes the *Borden* rule precisely as one of its holdings.

Moreover since the *Zacks* case *Borden* has been cited with approval of the rule against implied repeal in the Courts of Appeals for the 6th and 8th Circuits and the United States Court of Claims.²⁸

We believe that any careful analysis of the *Borden* case and subsequent cases citing it clearly compel the conclusion that the rule exists today with full efficacy and that the Supreme Court holds there should be a strong presumption against implied repeal.

²⁶*United States v. Borden*, 308 U. S. 188 (1939).

²⁷375 U. S. at 67, 68.

²⁸*Brown & Bartlett v. United States*, 330 F. 2d 692 at 696 (6th Cir. 1964); *Rawls v. United States*, 331 F. 2d 21 at 28 (8th Cir. 1964); *Drew v. United States*, 340 F. 2d 365 at 367 (U.S. Ct. of Claims 1965).

III

**If Dairyland Is Allowed to Stand, the "Attleboro Gap"
Is Again Open.**

This Court is likely well apprised of the fact that the Supreme Court in the famous *Attleboro* case³⁹ determined that transfers of electric power in interstate commerce were beyond the power of the states to regulate. This decision, of course, was several years prior to the enactment of Part II of the Federal Power Act, but the court concluded:

" . . . if such regulation is required it can only be attained by the exercise of the power vested in Congress." 273 U. S. at 90.

There was much talk in the committee hearings, etc. at the time of passage of the Federal Power Act that the purpose of Parts II and III of the Act was to close the gap created by the *Attleboro* case—it was to expand the Federal Power Commission's jurisdiction so that wholesale transfers of power in interstate commerce would not go completely unregulated. The court in *United States v. Public Utility Commission*, 345 U. S. 295 (1953), determined the question of whether the rates of power companies licensed to produce hydroelectric power under Part I of the Federal Power Act transmitted in interstate commerce, were subject to exclusive regulation by FPC under Part II of the Federal Power Act. The court said the *Attleboro* case prohibits state regulation of interstate sales except

³⁹*Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company*, 273 U. S. 88 (1927).

where Congress has specifically given permission for such regulation. It said:

"We have examined the legislative history; its purport is quite clear. Part II was intended to 'fill the gap'—the phrase is repeated many times in the hearings, congressional debates and contemporary literature—left by Attleboro in utility regulation." 345 U. S. at 307 and 308.

Subsequent to that determination, the United States Court of Appeals for the 1st Circuit in the *Shrewsbury* case cites the above-cited case with approval and again states that the purpose of Part II of the Federal Power Act was "to fill up and to fill up completely 'the gap left by Attleboro'."⁴⁰

Certainly the *Attleboro* rule forbids state regulation of coop sales at wholesale in interstate commerce. Thus, if the *Dairyland* decision stands and FPC lacks authority to regulate, the gap is once again open and there is a sizable segment of the industry unregulated either at the state or federal level. Of course many of the coops doing business in interstate commerce may fear FPC regulation but others such as Colorado-Ute, involved in the *Salt River* case now before this Court⁴¹ have come to understand that regulation may be necessary for them to survive in a modern world. One well known commentator on public utilities law wrote as follows immediately after reading the *Dairyland* decision:

⁴⁰*New England Power Company v. Federal Power Commission*, 349 F. 2d 258 (1st Cir. 1965) at 262.

⁴¹*Salt River Project, Agricultural Improvement & Power District, et al. v. FPC, et al.*, United States Court of Appeals for the District of Columbia Circuit No. 20960.

"There is impressive scholarly research, as well as ingenious statutory construction, in the majority's opinion by Commissioner Ross. But despite such exploration of the hypothetical intent of Congress in the mid-thirties (when both the FPC and REA laws were enacted), the majority does not come to grips with a much more pressing problem. What happens now—that a new gap (which, in recognition of his efforts might be called 'Administrator Clapp's Gap') has been created in the FPC's overall jurisdictional pattern? The present Congress is stalemated.

"Doubtless, both the REA Administrator and most of the co-ops are very happy about the situation as of now. But will they stay happy very long? It is idle to suggest that the REA Administrator can be a substitute for FPC regulation. True, as Commissioner Ross points out, the Administrator can fix co-op rates and limit their expansion—but these powers are all keyed to the REA role of creditor and promoter of rural electrification. The REA Administrator cannot be expected to have the expertise nor take on the regulatory responsibility for the broader implications of REA co-op operations as a constituent of the nation's integrated power supply.

"The fact is the cooperatives may have painted themselves into a corner of economic isolation. And the FPC may have thrown up an obstacle in their path back to the main stream of a national integrated power supply industry. The forthcoming congressional blackout investigation recommendations, as well as technological factors, will almost certainly bring about demands for larger and stronger power pooling and intercon-

nnections. FPC jurisdiction over these will inevitably follow. This same setup could have produced positive protective authority for the co-ops.

"True, co-ops can still join such clubs, voluntarily, by assuming stiff contractual commitments which would guarantee their performance and equalize their participating interests. But without such safeguards, what electric utility company or major municipal plant would be likely to jeopardize the reliability and efficiency of its own supply sources by admitting to membership co-operatives which neither they nor anyone else have any right to supervise? The Northeast power blackout of 1965 certainly pointed up the old truth about a chain being no stronger than its weakest link. The inherent difficulties of the co-ops, in keeping up with the technological parade and the economies of scale of larger organizations, are likely to become more and more pressing. Oddly enough Dairyland has been working very co-operatively with its power company neighbor for years.

"We have a good illustration of the possible adverse effect of this decision on co-op interests in the unsuccessful efforts of the Colorado-Ute Electric Association to get FPC to bail it out of its difficulties resulting from a Colorado supreme court decision invalidating the super co-op Hayden plant operation in that state, unless it could be certified as a public utility. The FPC might have helped the co-op out of this, but it consistently refused to do so by backing out of the case the day after it decided the Dairyland case, and for the same reasons. As these difficulties unfold, par-

ticularly if Congress refuses to authorize new sources of supplying financing, via federal bank bills, it is not inconceivable that the co-ops themselves may one day reverse their position.”⁴²

It is well to reflect upon the consequences that would flow from this court’s putting its stamp of approval on *Dairyland*. In the first place it would put this court in direct conflict with the 9th Circuit in the *City of Anchorage Case, supra*. It would, as the facts in the case at bar show, allow power companies to deny coops and municipalities access to their transmission lines if the use of those transmission lines were for delivery of power from some other “instrumentality.”

If the issue were faced squarely and not hedged, it would prohibit the state commissions from regulating REA coops at any level, not just in interstate commerce. It would enable the coops to commence actions all over the country to recover state and local taxes improperly paid and it would deny the tax support that those coops have been giving state and local governments from now on until the matter was changed by the Supreme Court or Congress.

It would provide easy opportunity for the power companies to protect their power pools even more assiduously than at present from admission of unregulated utilities. It would undoubtedly affect the anti-trust relationships between utilities deemed “instrumentalities” and jurisdictional public utilities. In

⁴²Pages With The Editor, Francis X. Welch, *Public Utilities Fortnightly*, February 2, 1967, P. 8.

short we submit that *Dairyland*, if allowed to stand, will create a myriad of extremely serious problems for all, including those who sought the decision in the belief they would benefit by it.

IV.

Regardless of *Dairyland*. FPC Had Ample Power to Grant Paris' Request.

The Commission decision herein holds it may not grant either Paris' request to require interconnection with KU for interchanges between Paris and East Kentucky, or Paris' request to approve the contract between it and East Kentucky. It says this is so because it has no jurisdiction over municipalities or over coops "which we have held to be a government 'instrumentality' under § 201(f) of the FPA."

First, regarding the approval of the contract, we think this is of little importance one way or the other. However, we find nothing in the Federal Power Act that would not permit two parties who might not be defined as utilities under the Act but who might be engaged in transmission of electric energy at wholesale in interstate commerce, from seeking advice and assistance from FPC which might include approval of a contract. Section 202(a) relates to voluntary interconnection and coordination and covers not only jurisdictional utilities but anyone having "facilities for the generation, transmission and sale of electric energy."

Section 303 applies to all agencies of the United States and requires them to meet certain obligations to the Commission regarding accounts, records, memoranda and rates of depreciation.

There are numerous points at which the Federal Power Act places certain responsibilities upon the Commission relative to those owning interstate facilities and engaging in interstate sales, even though they are "non-jurisdictional" in the general sense. So we simply say that this again is an example of the unnecessarily restricted view the Commission takes of its responsibilities under the Act.

With regard to the more important request of Paris, namely that KU be ordered to allow Paris to interconnect with the KU transmission line running through town so as to prevent the necessity of a wasteful duplication by construction of eight miles of line to connect with East Kentucky transmission, we invite this court's attention to the words of the Federal Power Act itself under § 202(b).

Section 202(b) says that the Commission may ". . . direct a public utility . . . to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy to sell energy to or exchange energy with such persons . . ." The Commission found Paris to be a "person" and "engaged in the transmission and sale of electric energy." It found Kentucky Utilities a "public utility." These findings are all that are necessary to meet the very specific language of § 202(b) and the

Footnote 3 in the *Paris* opinion citing discourse in the committee hearings between Messrs. Pettengill and Seavey is quite beside the point. This discourse had to do with point to point deliveries between Tennessee Valley Authority, a corporation wholly owned by the United States of America and quite a different type of organization from Paris or East Kentucky, even if the *Dairyland* ruling stands and East Kentucky is declared to be an instrumentality of the United States.

It is to be remembered that East Kentucky and KU are interconnected at nineteen points and their systems are operated as a single system, centrally dispatched by KU. The interconnection to be made by KU with Paris and Paris' arrangement with East Kentucky envisages simple displacements of power at one point and replacements at another back and forth without continuous point to point deliveries of firm power.

As has been said and as was evidenced at many points during the hearings, the real concern of the power companies when the Act was passed, was that FPC might have plenary authority to use the companies' transmission lines for point to point deliveries of firm power from agencies such as TVA and other totally owned government generation facilities to areas far beyond the normal markets for such power. Nowhere in the hearings is there anything to indicate that simple displacements such as is contemplated here would be forbidden and indeed the words of the Act clearly specify otherwise when they say that the Commission may force a utility to intercon-

nect — not with another utility — but with a *person*, it having been determined not alone in this case but in many other cases that a municipality is a "person."⁴²

The Supreme Court has made a number of efforts to get the Commission to accept broader responsibilities in the public interest by exercise of its authority under the Act. In *Udall v. Federal Power Commission*⁴³ a Federal Power Commission decision was reversed because the Court felt that the Commission had failed to discharge its responsibility to make a determination concerning "public interest" relative to a hydropower project at High Mountain Sheep on the Snake River. In the earlier *Colton* case⁴⁴, the Court said:

"In short, our decisions have squarely rejected the view of the Court of Appeals that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States. There is no such exception covering the Edison-Colton sale."⁴⁵

⁴²*New England Power Company v. FPC*, 349 F. 2d 258 (1st Cir. 1965) and *United States v. Public Utilities Commission*, 345 U. S. 295 (1953).

⁴³385 U. S. 926 (1967).

⁴⁴376 U. S. 205 (1964).

⁴⁵376 U. S. at 215 and 216.

The above quote from *Colton* does not talk about whether coops or investor utilities are concerned. It talks about "jurisdiction over interstate sales of gas or electricity at wholesale." It said that the Federal Power Act imposed responsibility on FPC relating "to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." It said there was no such explicit exception covering the sale to the city of Colton. Certainly Congress has not made sales to Paris subject to regulation by Kentucky.

In addition to the clear language of the Act itself, which would imply Paris might have the relief asked for, together with admonitions of the courts tending strongly to urge the Commission to use its authority to a broader extent, there are two decisions the Commission has made recently which are quite inconsistent with the decision herein. The first is the decision in the case of *Crisp County Power Commission v. Georgia Power Co.*, FPC Docket No. E-7120 (Order issued December 5, 1966.)

In this case Crisp County, a municipal type utility, was seeking an order under § 202(b) requiring Georgia Power Company to give it an interconnection. The Commission, in granting the relief requested, indicated that one of the sources from which Crisp County might receive power was SEPA — the South-eastern Power Administration which is a part of the Department of the Interior. It may be argued that this is *dicta* in the opinion, but we submit it consti-

tutes serious inconsistency with the Commission's position in the instant case.

The other case wherein the Commission has been inconsistent with its holding in the case at bar is the case of *Buckeye Power, Inc. and Ohio Power Company*, Docket No. E-7355, opinion issued August 4, 1967, rehearing denied August 28, 1967. This case was commented upon *supra*. In this case a non-profit cooperative type corporation whose owner-members are 28 rural electric coops was held to be a public utility within the meaning of § 201(e) and subject to Commission jurisdiction. Buckeye is totally owned by coops which contributed \$7,400,000 of their own money to set Buckeye up, borrowing other money on the open market. Agreement of REA had to be obtained as an essential precondition to the arrangement. All the power out of the Buckeye-owned generating facility is transmitted over transmission lines of the investor companies. Thus the Commission permits in *Buckeye* by indirection what it says it is powerless to permit in the instant case.

And so, despite our feeling that *Dairyland* is basically wrong, we respectfully submit that, irrespective of that case, the language of § 202(b) very clearly implies that Paris, as a person, has a right to ask and FPC to grant an order directing KU to interconnect for the purposes requested in the complaint.

CONCLUSION.

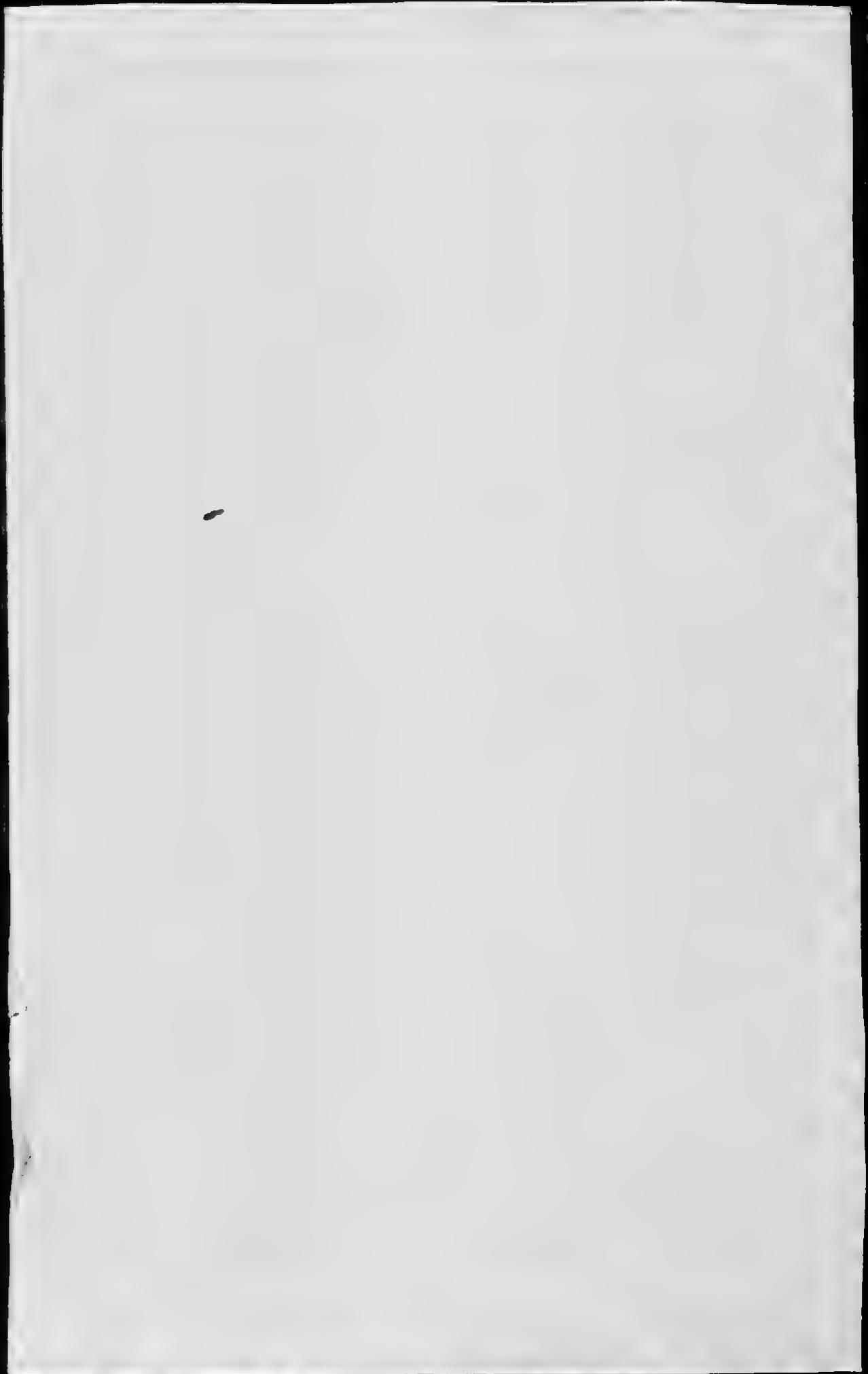
For the reasons hereinabove stated, Petitioners submit that the Commission's opinion and order herein should be reversed and the cause remanded to the Commission with instructions directing the Commission to grant the relief requested in the complaint.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

**INTERCONNECTION—TRANSMISSION FACILITIES
SALE OF ELECTRIC ENERGY**

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, and John A. Carver, Jr.

CITY OF PARIS, KENTUCKY

v.

KENTUCKY UTILITIES COMPANY

} Docket No. E-7249

OPINION No. 525.

OPINION AND ORDER DIRECTING PHYSICAL CONNECTION OF TRANSMISSION FACILITIES AND SALE OF ELECTRIC ENERGY.

(Issued August 4, 1967).

APPEARANCES:

Philip P. Ardery and James S. Wilson, Jr., for the City of Paris, Kentucky.

Squire R. Ogden, Malcolm Y. Marshall and Ralph D. Stevenson for Kentucky Utilities Company.

Wallace E. Brand for the Staff of the Federal Power Commission.

Opinion and Order, Etc.

CARVER, Commissioner:

The City of Paris, Kentucky (Paris) has requested the Commission to order Kentucky Utilities Company (KU) to interconnect its electric transmission facilities with those of Paris in order that Paris may obtain and exchange energy with East Kentucky Rural Electric Cooperative Corporation (East Ky).

Paris owns and operates an electric generation and distribution system. Its five diesel units have an aggregate available generating capacity of 5,467 kw. The peak hourly demand on the City's system was 3,950 kw in 1965 and an estimated 4,200 kw in 1966. The loss of one of its two largest (1360 kw capacity) generators consistent with peak demand would result in a capacity deficiency of an estimated 100 kw in 1966, and presumably more in 1967 and thereafter.

KU is a "public utility" subject to the jurisdiction of the Commission. It owns and operates generating, transmission and distribution facilities throughout Kentucky, serving many wholesale customers, including a number of municipalities. KU's transmission system is connected with, and its generating plants are operated synchronously with, generating plants owned by others located both within and outside Kentucky, including those of East Ky and Tennessee Valley Authority.

East Ky is an REA financed G and T cooperative which owns and operates two steam generating plants and a system of transmission lines to supply its member cooperatives in central, southern and eastern Kentucky. East Ky's transmission lines are tied to KU's transmission system at some nineteen points. Some of East Ky's loads are served from KU's lines and some of KU's loads are served from East Ky lines.

Opinion and Order, Etc.

KU serves that part of the City of Paris and environs not served by the Paris municipal electric system, and operates a 69 kv transmission line and a 33 kv transmission line through Paris. KU's 69 kv line is within 150 feet of Paris' generating station.

The firm power capacity of Paris' system is not adequate. To meet its increased demands, Paris could install additional generating capacity. It could also become a customer of KU and to this end entered into negotiations with KU which were unsuccessful.

A third possibility which led to the instant proceedings was to secure additional energy from East Ky. To this end, it negotiated an agreement with East Ky for the sale and exchange of energy between them. But the nearest facilities of East Ky are 8.7 miles from Paris, and to obviate the necessity for constructing a 69 kv transmission line for that distance, the application for an order from us ordering KU to transmit the energy between them was filed. Since KU is already interconnected with East Ky, the construction of less than 1500 feet of 69 kv line between KU and Paris would physically permit an exchange.

Paris has also asked the Commission to approve its agreement with East Ky.

We hold that the Commission may not grant either of Paris' requests. The Commission has no jurisdiction over the activities of municipalities,¹ or over REA-financed co-operatives which we have held to be a government "instrumentality" under section 201(f) of the FPA.² This Commission does not have to decide whether it can order under section 202(b) a public utility to transmit power for the benefit of third parties since it is clear that the Commission

¹Section 201(f).

²Dairyland Power Cooperative, et al., Opinion No. 511, January 5, 1967; Order, Salt River project Agricultural Improvement and Power District, Docket No. E-7806, January 6, 1967.

Opinion and Order, Etc.

cannot compel a private utility to transmit the power of government instrumentalities under Part II of the FPA.³ In view of the foregoing it is not necessary to consider the correctness of Staff's characterization of the proposed arrangement.

This is not to say that this Commission is without the power to enter an order to serve the objectives of Part II of the Federal Power Act. Paris is a "person" within the meaning of section 202(b), and is engaged in the transmission and sale of electric energy.⁴ The Commission may direct an interconnection, and may order KU to provide service directly to Paris pursuant to section 202(b) of the Act. Such action is dependent upon the existence of an application, notice to the Kentucky Public Service Commission and KU, an opportunity for a hearing, and a finding that such action is necessary or appropriate in the public interest, that it imposes no undue burden upon KU, and that it does not require the enlargement of KU's generating facilities or impair its ability to render adequate service to

³During the hearing on the forerunners of the Federal Power Act this point was repeatedly made. During the Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5423, the following colloquy took place at pp. 397-398:

"MR. PETTENGILL. Mr. Commissioner, you just said a moment ago that as you construed the bill, a private power line could not be required to carry electric energy generated by the Tennessee Valley Authority or a municipal plant owned by a city, or a State; is that correct?

"COMMISSIONER SEAVEY. Yes; that is my understanding of the bill.

"MR. PETTENGILL. Because, as you said, the word 'person' does not include a municipality or a governmental body?

"COMMISSIONER SEAVEY. I think that municipalities are particularly excluded, and it is my belief that any other Federal agency, any other governmental agency, would be excluded under the terms of the bill."

Similar statements were made by Mr. DeVane during hearings before the Senate. See Hearings, Senate Committee on Interstate Commerce on S. 1725, 74th Congress, 1st Session, at p. 256. The Supreme Court has also recognized this point. *United States v. P.U.C.*, 345 U. S. 295 at p. 313, footnote 23.

⁴*New England Power Co. v. F.P.C.*, 349 F. 2d 258; *U. S. v. P.U.C. of California*, 345 U. S. 295; *California Electric Power v. F.P.C.*, 190 F. 2d 206, cert. denied 345 U. S. 934; *Crisp County*, Opinion No. 508, December 5, 1966.

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its customers. Our authority extends to prescribing terms and conditions, including apportionment of costs and compensation.

The record is adequate in all respects. It shows the existence of a proposed rate schedule for secondary energy, subject to KU's right to interrupt supply for not exceeding 400 hours in any period of twelve consecutive months, or 1,000 hours over a period of five years.⁵

KU's willingness to deliver on these terms is in the record. Another consideration is the avoidance of the investment in duplicate facilities, and the avoidance of aesthetic impairment in the area arising from such construction.

Paris may prefer service from East Ky., and may even be willing to pay more for it. But Paris does not contend that we could order such relief, even if we agreed, absent reversal of our own decision in *Dairyland*.

In the course of oral argument Paris moved, and subsequently filed a motion, that the Commission order KU to permit a temporary interconnection with its 69 kv transmission line at a point reasonably proximate to the Paris substation for the purpose of receipts and deliveries of power between Paris and East Ky. Staff filed a response to and concurrence in Paris' motion and KU also filed a response. Thereafter KU filed a motion to strike staff's response and staff filed an answer to KU's motion. Subsequently, KU concurrently filed a motion for leave to file a response to staff's concurrence and a response to which Paris and staff in turn filed replies.

In view of our opinion and order herein, Paris' motion the purposes for which it requests the temporary interconnection, and the subsequent pleadings filed in relation thereto are all rendered moot.

⁵It is not the intent of KU to exercise its right of interruption except to the extent that it is required to do so by emergencies on its own system. TR. 380-391.

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The Commission further finds:

- (1) Kentucky Utilities Company is a "public utility" subject to the jurisdiction of the Commission.
- (2) The City of Paris, Kentucky, is a "person" within the meaning of section 202(b) of the Federal Power Act and is engaged in the transmission and sale of electric energy.
- (3) The establishment of a physical connection between the transmission facilities of KU and Paris and the sale of energy to Paris is necessary and appropriate in the public interest; it will impose no undue burden on KU nor require the enlargement of KU generating facilities or impair its ability to render adequate service to its customers.

The Commission orders:

Kentucky Utilities Company shall interconnect its 69 kv transmission line in Paris to the electric facilities of Paris at a point reasonably proximate to the Paris substation as soon as Paris completes the transmission facilities necessary to such interconnection and thereafter shall sell and supply energy to Paris under the rate schedule, as supplemented, offered to Paris and entered in the record as Annex A and Annex B to the Paris complaint and as Exhibit No. 2 of Kentucky Utilities Company.

By the Commission.

(Seal)

Gordon M. Grant,
Secretary.

APPENDIX B**RELEVANT SECTIONS, FEDERAL POWER ACT**

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary to the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside

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thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a state or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. [49 Stat. 847, 16 U.S.C. 824]

* * *

SECTION 202. [*As amended August 7, 1953.*] (a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to pro-

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mote and encourage such interconnection and coordination with each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

(c) During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage

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of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.

(d) During the continuance of any emergency requiring immediate action, any person engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction: *Provided*, That such temporary connection shall be discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: *Provided further*, That upon approval of the Commission permanent connections for emergency use only may be made hereunder.

[49 Stat. 848, 67 Stat. 461, 16 U.S.C., sec. 824a]

* * *

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SECTION 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rates or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable differences in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow

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changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such por-

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tion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [49 Stat. 851, 16 U.S.C. 824d]

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SECTION 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed, and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. [49 Stat. 852, 16 U.S.C. 824e]

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SECTION 207. Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for

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hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. [49 Stat. 853, 16 U.S.C. 823f]

* * *

SECTION 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however*, That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission

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may suspend a charge or credit pending submission of satisfactory proof in support thereof.

(b) The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of licensees and public utilities, and it shall be the duty of such licensees and publish utilities to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order required, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

(c) The books, accounts, memoranda, and records of any person who controls, directly or indirectly, a licensee or public utility subject to the jurisdiction of the Commission, and of any other company controlled by such person, insofar as they relate to transactions with or the business of such licensee or public utility, shall be subject to examination on the order of the Commission. [49 Stat. 854, 16 U.S.C. 825]

* * *

SECTION 302. (a) The Commission may, after hearing, require licensees and public utilities to carry a proper and adequate depreciation account in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission may, from time to time, ascertain and determine, and by order fix, the proper and adequate rates of depreciation of the several classes of property of each licensee and public utility. Each licensee

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and public utility shall conform its depreciation accounts to the rates so ascertained, determined, and fixed. The licensees and public utilities subject to the jurisdiction of the Commission shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such licensee or public utility shall in any case include in any form under its operation or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses. Nothing in this section shall limit the power of a State commission to determine in the exercise of its jurisdiction, with respect to any public utility, the percentage rate of depreciation to be allowed, as to any class of property of such public utility, or the composite depreciation rate, for the purpose of determining rates or charges.

(b) The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or as to depreciation rates, shall notify each State commission having jurisdiction with respect to any public utility involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations. [49 Stat. 855, 16 U.S.C. 825a]

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SECTION 303. All agencies of the United States engaged in the generation and sale of electric energy for ultimate distribution to the public shall be subject, as to all facilities used for such generation and sale, and as to the electric energy sold by such agency, to the provisions of sections 301 and 302 hereof, so far as may be practicable, and shall comply with the provisions of such sections and with the

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rules and regulations of the Commission thereunder to the same extent as may be required in the case of a public utility. [49 Stat. 855, 16 U.S.C. 825b]

* * *

SECTION 306. Any person, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act may apply to the Commission by petition, which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such licensee or public utility, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such licensee or public utility shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall find proper. [49 Stat. 856, 16 U.S.C. 825e]

* * *

SECTION 307. (a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this Act or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this Act or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this Act relates. The Commission may permit any person to file with it a statement in writing under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation.

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The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject [49 Stat. 856, 16 U.S.C. 825f]

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SECTION 309. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

[49 Stat. 858, 16 U.S.C. 825h]

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SECTION 311. In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not other-

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wise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section. [49 Stat. 859, 16 U.S.C. 825j]

* * *

SECTION 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any orders of the Commission shall be brought by any person unless such person shall have made application to

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the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this act.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that

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there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such a manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [49 Stat. 860, 16 U.S.C. 8251]

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sition provisions of section 203(a), the security approval provisions of section 204 (section 204 does not apply where the public utility is organized and operating in a state which provides for regulation of its security issues); the rates and charges provision of sections 205 and 206 (which, of course, do *not* include any authority over retail rates), the adequate service provisions of section 207, and the cost of property provisions of section 208. In addition, a "public utility" is subject to the accounting and depreciation requirements of sections 301 and 302, as well as to certain specific procedural provisions of the Act (sections 209(b), 304, and 306).

The definition of a public utility in the Federal Power Act is stated in terms of the types of facilities a person owns or operates, rather than the organizational structure of the "person" owning or operating the facilities, the source of its financing, or the nature of the service, if any, it holds itself out to perform. Congress' intent to focus upon the nature of the facilities owned or operated, rather than the nature of the person owning or operating these facilities, was manifested by the amendments to section 3 of the Federal Water Power Act (adopted simultaneously with Parts II and III), to define the term "person" and broaden the existing definition of the word "corporation". Person was defined to mean "an individual or corporation". And "corporation", which previously had been defined as "a corporation organized under the laws of any State of the United States empowered to develop, transmit, distribute, sell, lease or utilize power . . ." was now defined to refer generally to "any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing". The reason given for this change by the House Committee Report (H.R. 1318, 74th Cong., 1st Sess., p. 22) is significant.

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It states "[T]he definition of 'corporation' is broadened; at present the term relates only to electric companies, but in drafting the new sections it has been more convenient to have it relate to all corporations and similar forms of business organizations" (emphasis added).

The definition of the parties subject to Commission regulation under Part II is to be contrasted with jurisdictional definitions in analogous federal regulatory statutes which uniformly have defined the regulated class in terms of the type of service they perform for the public.¹ Significantly where the regulatory scheme of such Acts differentiates as to type of regulation on the basis of the nature of the holding-out of the company performing the service, this is expressly stated in the statutes themselves.² Also, where Congress intended to exempt cooperatives from regulatory language otherwise broad enough to include them, it has done so by specific language. See 49 U.S.C. 1002, *United States v. Pacific Coast Wholesalers Ass'n*, 338 U. S. 689. On the other hand, where, as here, a statute contained no such exemption, the courts have held that a

¹See Interstate Commerce Act, Title, 49 U.S.C. §§1(1)(3) (railroads and pipelines, other than for natural gas), 302-303 (motor carriers) 902, 904 *et seq.* (water carriers), 1002 (freight forwarders); Federal Aviation Act, 49 U.S.C. § 301 (Air carriers); Communications Act of 1934, as amended, 47 U.S.C. § 153(h) and Title II (communications common carriers by wire or radio); Shipping Act of 1916, as amended, 46 U.S.C. § 801 (common carriers by water in foreign and interstate commerce); *cf.*, Mineral Leasing Act of 1920, 41 Stat. 449, as amended, 30 U.S.C. 185 (1958), making certain pipelines securing right-of-way permits from the Secretary of Interior "common carriers."

²See Title III of the Interstate Commerce Act, 49 U.S.C. 301, *et seq.*, esp., § 304, 306-310, distinguishing between the regulations of motor carriers on the basis of whether they are "common carriers" (49 U.S.C. 308(a) (14) or "contract carriers" (49 U.S.C. 308(a) (15), and prescribing a still different degree of regulation over "private carriers of property" (49 U.S.C. 308(a) (17); Title IV of the Interstate Commerce Act, 49 U.S.C. 901, *et seq.*, making similar distinctions between "common" and "contract" carriers by water (*cf.*, 49 U.S.C. 902(d)) with 49 U.S.C. 902(e), see *e.g.*, 49 U.S.C. 906, establishing the different standards for common and contract carriers by water with respect to their tariffs and schedules). *Cf.*, the Communications Act of 1934, as amended, 47 U.S.C. 151, *et seq.*, which provides for the licensing of all persons engaged in interstate or foreign radio communications (Title III of the Act) and superimposes thereon detailed rate and service regulation of radio "common carriers" (Title II of the Act).

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cooperative air freight forwarder was an indirect air carrier under the Civil Aeronautics Act of 1938. *Consolidated Flowers Shipments v. Civil Aeronautics Board*, 213 F. 2d 814 (CA 9).

The legislative history of section 201(e) fully supports this proposition that the term "public utility" was not intended to import into the statute the concept of a holding out to serve the public generally. From the start, the Commission's jurisdiction under Part II of the Federal Power Act was drafted in terms of persons owning or operating jurisdictional facilities rather than any consideration of the manner in which such persons were organized to do business or the nature of their holding-out to the public, and the term "public utility" was used merely as a shorthand device to refer in subsequent sections of the Act to persons subject to the Commission's jurisdiction. See H.R. 5423, 74th Cong., 1st Sess., as introduced on February 6, 1935, p. 104²; S. 1725, 74th Cong., 1st Sess., as introduced February 6, 1935, p. 105. And in the Senate hearings, Mr. DeVane, the Solicitor of the Commission, who was largely responsible for the original draft of Parts II and III, submitted an "analysis" of the bill, stating (Hearings before Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., p. 246):

The term "public utility" is used for convenience to define the operating companies that come under the provisions of the title. In subsequent provisions it is thus unnecessary to make constant reference to the limited jurisdiction of the Commission; use of the term "public utility" carries with it this essential limitation.

²"Every person who owns or operates facilities subject to the jurisdiction of the Commission under this title and every person who controls, directly or indirectly, any such person, shall be subject to the provisions of this Act. The term 'public utility' when used in this Act means any person who owns or operates such facilities."

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Nowhere in the hearings, reports or debates was there any suggestion that the plain meaning of section 201(e) was in any way to be limited beyond its terms. Specifically, there was no suggestion that it did not apply to cooperatives or to borrowers from governmental sources.

B. The Administrative "History" of Commission Jurisdiction Over Cooperatives

In view of the above, I should conclude that the Commission's jurisdiction over public utilities included jurisdiction over cooperatives owning or operating jurisdictional facilities, even if this jurisdiction had lain totally dormant during the 28 years since Part II of the Act was enacted. For an agency's failure to utilize statutory authority does not result in waiver or lapse, even where it may in the meantime have taken the position that it does not possess the authority. *Phillips Petroleum Co. v. Wisconsin Public Service Commission*, 347 U. S. 672, 677-678 (1954); *United States v. DuPont*, 353 U. S. 586, 590 (1956); *United States v. American Union Transport Co.*, 327 U. S. 437, 454-55 (1945); *Union Stockyard Co. v. United States*, 308 U. S. 213, 224 (1939). In fact, however, the administrative history is consistent with and supports the position I have reached.

It is argued that the views expressed by the Federal Power Commission when the REA Act was before Congress are inconsistent with its exercise of any jurisdiction over borrowers from that agency. For the Commission, in response to a request for its comments, generally approved the proposed legislation and limited its specific comments to pointing out a possible conflict between its powers to investigate all facets of electric service with the provision which would authorize the REA Administrator to investigate rural electrification. Surely, it is argued, if the Com-

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mission at the time thought it had any other responsibility with respect to potential REA borrowers it would have said so.

If there were no other contemporaneous statements of Commission views on the subject, this position might be plausible. Absent such statements, it could be argued that the Commission's failure to mention other aspects of its jurisdiction over REA borrowers was merely because it didn't conceive such jurisdiction as conflicting with that to be given the REA.⁴ Another reason for the failure of the Commission to refer to its own jurisdiction over public utilities may well have been the general lack of prescience as of 1935 that the rural electrification program would expand to include many companies owning or operating jurisdictional facilities.⁵

But we are not left to surmise as to the current views of responsible members of the FPC and REA as to the scope of Commission jurisdiction over REA borrowers. For on January 11, 1936, prior to the passage of the REA Act, the "broad definition" of the newly adopted Parts II and III of the Federal Power Act was interpreted by Dr. Jack Levin, Assistant Counsel of the REA (then operating pursuant to Executive Order No. 7037, May 11, 1935) as

⁴To the extent that such absence of conflict could not be said to exist if the Commission's jurisdiction over security issues under section 204 does not extend to passing upon potential REA loans, this merely conforms to the views expressed in Part II of this opinion.

⁵As a result of the FPC statement an amendment was offered to what is now section 2 of the Rural Electrification Act to require REA investigations of REAs to be made "in cooperation with the Federal Power Commission" (80th Cong. Rec., 2824). The amendment was objected to by Senator King on the ground that it would imply that the Commission, contrary to his understanding, had authority to investigate rural electrification (*ibid.*). But nothing in Senator King's statements or Senator Norris' replies thereto can be read as indicating that they believed the Commission had no jurisdiction over REA borrowers. On the contrary, King stated, "I have no objection to the Federal Power Commission proceeding under the authority which they now possess . . ." and proposed only that the section be redrafted to provide that "nothing in this section shall be so construed as to impinge upon or interfere with any of the authority conferred upon the Federal Power Commission" (*id.* at 2824-25).

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"includ[ing] besides public utilities, cooperatives and other public bodies the REA makes loans to." Specifically, he stated "the board definition of corporation, licensee, municipality, project cover all classes of REA borrowers."⁶ A copy of this memorandum was sent to the FPC. Thereafter on January 22, 1936, Mr. Levin wrote the FPC Chairman, Frank R. McNinch, asking whether "the contract for an REA loan . . . require[s] . . . the approval of the Federal Power Commission" and whether "the rate given by the [prospective borrower] require[s] . . . approval."⁷ The Chairman replied by letter of January 24, 1936, that he believed the note was a security requiring this Commission's authorization provided that the borrower already owned or operated other jurisdictional facilities.⁸

The same question was raised with respect to a hypothetical borrower in a letter from the REA's General Counsel to Mr. Oswald Ryan, then FPC General Counsel. The hypothetical borrower was clearly outside this Commission's jurisdiction because it was an intrastate distributor, purchasing all its energy intrastate. Mr. Ryan wrote in a letter dated February 8, 1936: ". . . the character of the organization seeking a loan is relatively unimportant, as the status of public utility is conferred upon any person owning or operating facilities subject to the jurisdiction of the Commission under Part II of the Federal Power Act. Such public utility status therefor (sic) may attach to cooperatives as well as to corporations engaged in the business of selling electric energy to consumers for a profit".

Id. at p. 1.

⁶Levin, Memorandum to Vincent Nicholsen, REA General Counsel, Re: Jurisdiction of the Federal Power Commission Over REA, January 11, 1936, p. 1.

⁷*Id.* at 4.

⁸Letter from Jack Levin to FPC Chairman Frank R. McNinch, Jan. 22, 1936, p. 1.

⁹Letter from FPC Chairman McNinch, Jan. 24, 1936, p. 1.

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There does not seem to have been any formal assertion of Commission jurisdiction over REA cooperatives during the following eleven years (or for that matter, any rejection of jurisdiction during this period). Commencing in 1947, however, the Commission has asserted its jurisdiction over REA cooperatives in a series of proceedings. The principal situation in which this has occurred is with respect to proceedings under section 203 where cooperatives have leased or sold their assets to investor-owned public utilities. See, e.g., *Ark-La Electric Co-op., Inc.*, 6 FPC 1037 (1947); *Montana-Dakota Utilities & Dakotas Electric Co-op., Inc.*, 8 FPC 869 (1949); *Frontier Power Co.*, 9 FPC 1298 (1950); *Black Hills Power & Light Co. and Rushmore G.&T. Electric Cooperatives, Inc.*, 10 FPC 864 (1951). It has been contended that in each one of these cases an investor-owned utility was also involved as buyer or seller, and thus the finding that the co-op was a public utility was unnecessary dicta. Whether or not this is true, it does not detract from the fact that the Commission since 1947 has uniformly made such findings. Moreover, in at least one case (*Black Hills Power & Light Co., supra*), the Commission's finding was made in the course of rejecting a motion to dismiss for want of jurisdiction.

Similarly the Commission in a number of cases has advised REA co-ops that sell power at wholesale in interstate commerce by participating in power interchanges with investor-owned companies, that they, too, were required to file rate schedules pursuant to section 205. See, e.g., Letters to Minnkota Power Cooperative, Inc., Nov. 16, 1950; Sep. 9, 1955; Dec. 3, 1956; Feb. 1, 1957; Dec. 8, 1957 and Nov. 10, 1960; Coos-Curry Electric Cooperative, Inc., Dec. 15, 1950; June 21, 1951; Dairyland Power Cooperative, Aug. 14, 1961. In each case the cooperative responded by filing certificates of concurrence with already filed rates (as permitted by section 35.3 of the Commission's Regulations).

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And at least one co-operative, Tippah Electric Co-op, filed an original cost statement after being required to do so.¹⁰

I do not suggest that this sporadic administrative history standing by itself would be too persuasive. But it does demonstrate the invalidity of complaints that the Commission was in any way breaking new ground when it suggested in *Southwestern Power Administration-United States Department of the Interior*, 27 FPC 895, 898, that Associated Electric Co-op, which participated in an interstate interconnection agreement with other purchasers from the Administration, was an electric utility. It also underscores the irrelevance to the present question of the various attempts of Congress, during the very period the Commission was holding that cooperatives could be public utilities, to give the Commission specific new powers to review certain REA loans.

The proposals to give the Commission authority over REA loans were introduced, both in the form of legislative proposals and as riders to REA appropriations bills during 1946 and 1947. The first of these efforts, (H.R. 5555, 79th Cong., 2d Sess.), was a bill introduced in 1946 which would have precluded any REA loans for generation or transmission facilities unless the borrower had first secured the consent of a "State authority having jurisdiction in the premises, or, if there is no such State authority, unless the consent of the Federal Power Commission is first obtained; and the Federal Power Commission shall not give such consent unless it first determines that the proposed acquisition, construction [. . . etc.] will result in a lower cost of electricity to the rural electrification project . . . to be secured therefrom than could otherwise be obtained". The bill was not reported out of committee. But during the same Congress, a rider was of-

¹⁰These actions were taken by letters from the Secretary and not by formal Commission order. They are for this reason of lesser significance.

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ferred to the Urgent Deficiency Appropriations Act of 1946 which would have precluded any REA loans for generating facility construction or acquisition "unless the Federal Power Commission would first certify that there is not sufficient electric current available in the area concerning the responsible rates". (92 Cong. Rec., 1799). There was considerable discussion of this proposal on the floor of the Senate (*ibid* at 1799-1817), after which it was defeated by a vote of 52-21.

In the 80th Congress a bill was introduced (H.R. 2709, 80th Cong., 1st Sess., 1947) paralleling H.R. 5555 to which I have already referred. No action was taken on this bill. However, the House Committee on Appropriations, in reporting the 1947 Department of Agriculture Appropriations Bill, spoke favorably of the pending proposal (see H. Rep. No. 450, 80th Cong., 1st Sess., p. 32). Apparently as a substitute for the proposed bill, the Senate Report on the 1947 Agricultural Appropriations bill contained a paragraph instructing the REA Administrator to report proposed loans for generating plants to the two appropriations committees 30 days in advance of their approval.

All these proposed bills would have gone far beyond any existing authority the Commission may have over REA co-ops. The bills applied to all co-ops, whether or not they owned or operated jurisdictional facilities and were thus public utilities within the meaning of the Federal Power Act. And the standards under which the Commission would have passed upon proposed loans under these bills—that "there is not sufficient electric current available in the area concerned at reasonable rates" or that the proposal "will result in a lower cost of electricity in the rural electrification project . . . to be secured therefrom than would otherwise be obtained," are both more specific and more far-reaching than any authority the Commission presently exercises over the security issues of public utilities under

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section 204 of the Act. It was thus not surprising that Congressmen on both sides of the issue asserted that adoption of such a proposal would give the Commission significant authority it did not already possess. There is, however, no statement during the lengthy debates on the proposal that the Commission lacked any jurisdiction over REA co-ops. And while it can be said that a number of the Senator's statements indicated a belief that the Commission had no existing power to disapprove loans made by REA to co-ops, this is a proposition which, as indicated in part II, *infra*, is not inconsistent with the Commission's having jurisdiction over cooperatives owning or operating jurisdictional facilities, and in which I concur.

C. *The Contentions that Section 201(e)
Should Not be Read Literally.*

Since the literal meaning of the critical statutory language and its legislative history clearly supports a positive answer to the question presented, this interpretation, under normal standards of statutory construction must prevail in the absence of strong extrinsic evidence that Congress nevertheless did not intend the language to be so read, or that a literal reading would be inconsistent with other provisions of the Act and the basic statutory scheme. See *Walling v. Portland Terminal Co.*, 330 U. S. 148 (1947); *Pillsbury v. United Engineering Co.*, 342 U. S. 197 (1952); *United States v. Shirey*, 359 U. S. 255 (1959). I have carefully examined the various arguments which have been made in support of such contentions and find them all to be unpersuasive.

It is strongly urged, that the definition of public utility must be read in the light of the language of Section 201(a) of the Federal Power Act which generally states the need for exercise of the regulatory authority of Parts II and III of the Act. This section provides:

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It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

The argument is that only the business of transmitting and selling electric energy "for ultimate distribution to the public" is declared to be affected with a "public interest" and federal regulation is declared to be in the public interest only with respect to "such business" or "such energy." Cooperatives, it is urged, sell only to their members and thus are not involved in either the transmission or sale of electrical energy for "ultimate distribution to the public."

Nothing in the legislative history of the Federal Power Act supports the suggestion that the language "for ultimate distribution to the public" was intended to limit the reach of the Act to electric companies holding themselves out to provide electrical service to all members of the public (the "common carrier" concept) as contrasted with those who offered to serve only limited portions of the public (the "members" of cooperatives or others with whom they might "contact" to act as "carriers").

The phrase "ultimate distribution to the public" did not appear in the original draft of the Federal Power Act. It came into the body of the Act as one of a series of amendments suggested by the National Association of Railroad & Utility Commissioners (NARUC). In explaining the new

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language, Mr. Benton, General Solicitor of NARUC, stated that the intent was "to insert this declaration, which is taken from Title III of the bill" and to add to it "a clear declaration by Congress of its intention to grant the power to the Federal body to regulate that which is beyond the jurisdiction of the local Commission." (Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 5423, 74th Congress, 1st Sess., pt. 3 at p. 1677.)

Mr. Benton explained that the only purpose of the amendment he proposed was to make clear where federal authority left off and state authority began (*ibid.*). Nowhere in his testimony did he suggest that the amendment was designed to limit the phrase "public utility"—which was included in the original draft—to companies holding themselves out to serve *all* members of the public.

As Mr. Benton stated, the phrase "ultimate distribution to the public" "was taken from Title III of the bill." Title III provided for federal regulation of the natural gas industry, and was the basis for the Natural Gas Act passed several years later. It included an initial declaration of purpose to the effect that "the business of selling, transmitting and distributing, as a part of interstate commerce, natural gas for ultimate public consumption is affected with a public interest . . ." (H.R. 5423, *supra*, p. 141). The draft also contained a provision, similar to that used in the draft of Title II of the Power Act, providing that "persons" owning or operating natural gas facilities subject to the Commission's jurisdiction should themselves be subject to the jurisdiction of the Act, and utilizing the term "distributor" as the shorthand name for all such persons.

Because the Congress recognized that Title III would have to be rewritten, see Hearings at 2212-13, it was not discussed in the Committee reports or in the Congressional debates. But eventually this phrase was incorporated in

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the Natural Gas Act.¹¹ This strongly suggests that the phrase "ultimate distribution to the public" does not refer to the common carrier concept, since the Natural Gas Act does not make the pipelines "common carriers."¹²

We are thus left to speculation as to the intended meaning of the phrase "for ultimate distribution to the public." The most logical view is that this language was intended to do more than to emphasize the fact that no federal regulation was being imposed upon the transportation or distribution of power by a company solely for its own use. If so, it would be the policy statement analogue of the provision in section 201(b) exempting from the Commission's jurisdiction facilities (and hence persons owing or operating only such facilities) "for the transmission of electric energy consumed wholly by the transmitter."¹³

Nor can it be argued that an electrical cooperative in providing service to its members is merely transmitting energy for consumption wholly by itself and hence its facilities are exempted by this latter provision of section 201(b). For, regardless of whether the relationship between co-ops and their members are such as to warrant different regulatory treatment than the relationship between a privately owned corporation and its customers, the cooperatives' members are no more the cooperative itself than a corporation's stockholders are the corporation.

¹¹See Natural Gas Act § 1(a) (15 U.S.C. 717(a) (1958)).

¹²See Hearings Before the Subcommittee on Interstate and Foreign Commerce on H.R. 11662, 74th Cong., 2nd Sess., at p. 38 (1936). Cf. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332, 338-9 (1956); Natural Gas Act § 7(a), 15 U.S.C. 717f(a) (1958); Compare S. 1919, § 9(a), 75th Cong., 1st Sess. (1937); Mineral Leasing Act, § 28, 30 U.S.C. 185 (1958).

¹³This provision appeared in the original draft of both the proposed Title II of the Power Act and the proposed Title III to regulate the transmission and sale of natural gas, in terms of the Act not applying to facilities "for the transmission of energy [natural gas] solely for the use of the producer or transmitter or the use of his tenants on property owned or controlled by him and not for resale" (H.R. 5423, *supra*, p. 104, 142).

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What obviously is covered by the exemption in both cases are lines used solely to transmit energy for use by the electric company itself rather than lines the company uses to serve individuals who "own" or are participating members in the company.

Moreover, even if it could be assumed that the phrase "ultimate distribution to the public" connotes a general holding-out to provide service to all members of the public and that cooperatives do not fit such a classification (because they serve only their members), it would not follow that cooperatives would be exempted from the Act. For the Supreme Court has conclusively determined that the general policy declaration of section 201(a) cannot serve to negate the grants of jurisdiction made elsewhere in the Act. Thus in *United States v. Public Utilities Commission of California*, 345 U. S. 295, 310-311, the Court stated:¹⁴

So we conclude that the limitations of § 201(a) on federal regulation cannot, and were not intended to, preserve an exclusive state regulation of wholesale hydro-electric sales across state borders. Even if we conceived of the matter as one peculiarly limited to the statutory wording of § 201(a), our statement that "[e]xceptions to the primary grant of jurisdiction in the section are to be strictly construed," *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682, 690-691, would be as applicable here as to § 1(b) of the Natural Gas Act. "Production" and "distribution" are elsewhere specifically excluded

¹⁴Language in the earlier opinion in *Connecticut Light and Power Co. v. Federal Power Commission*, 324 U. S. 515 at 525 that "the policy admonition [of § 201(a)] is to be heeded in determining whether particular facilities make their owner a 'public utility'" is not to the contrary. The context of this statement was whether particular facilities were "local distribution" facilities within the meaning of § 201(b)—a term not otherwise defined and of considerable ambiguity. As the latter citation from *Connecticut Light and Power*, cited in text above, makes clear, the policy statement has no force in undercutting a "clear and specific grant of jurisdiction" even if the latter is inconsistent with the policy declaration.

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from Commission jurisdiction, § 201(b); the phrase relied on in § 201(a) was originally drafted as a declaration of "policy," and the rewording which gave it its present more succinct form was unaccompanied by any "mention [of] this change as one of substance." *Jersey Central Power & Light Co. v. Federal Power Commission*, 319 U. S. 61, 76, referring to H.R. Rep. No. 1318, 74th Cong., 1st Sess. 26. "It cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose." *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U. S. 515, 527. To conceive of it now as a bench mark of the Commission's power, or an affirmation of state authority over any interstate sales for resale, would be to speculate about a congressional purpose for which there is no support.

2. Despite the fact that there is no reference to cooperatives in the entire legislative history of the 1935 amendments to the Federal Power Act,¹⁵ the proponents of excluding cooperatives from any Commission jurisdiction, argue that this history conclusively shows that only investor-owned profit-making utilities holding themselves out to provide electric service to the public generally were intended to be covered.

This argument rests upon selected excerpts from colloquies during the House hearings on the bill between the

¹⁵The only reference to REA in the legislative history of the Federal Power Act relates to the proper exercise of the certificate power which was contained in H.R. 5423, but deleted from the final bill. See Hearings Before The House Committee on Interstate and Foreign Commerce On H.R. 5423, 74th Cong., 2d Sess., pt. 3, pp. 2159-60 (1935). The cited colloquy concerned competing efforts by a hypothetical REA-financed *municipality* and a private power company to serve a rural area. Since the draft statute would not have given the Commission certificate jurisdiction over municipalities, the apparent assumption throughout the colloquy that the Commission's certificate jurisdiction would be exercised solely with respect to the private utility says nothing about FPC jurisdiction over REA borrowers, or cooperatives in general.

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Solicitor of the Commission, Mr. DeVane, a principal draftsman of Title II, and a number of Congressmen (see Hearings, *supra*, pp. 480, 481, 537-539, 543, 544) supplemented by some similar statements by FPC Commissioner Seavey (*id.* at 424, 437-438). They primarily involve questions relating to provisions of the bill, subsequently stricken, to impose common carrier obligations upon the public utilities subject to the Commission's jurisdiction and provide for certification of their lines. The issue was the scope of Congress' constitutional power to impose such regulatory inhibitions on business in the light of the indefinite state of the interstate commerce clause as of 1935 and a series of decisions under the due process clause of the 14th Amendment limiting the states' power to interfere with business in general and the utility business in particular. In this posture Messrs. DeVane and Seavey not unnaturally stressed the existing cases which had held that private companies dedicating their services to the public generally —the group which made up the great bulk of the utility industry—were subject to such regulation.

There is absolutely nothing in this testimony which indicates that either DeVane or Seavey believed that the scope of the term "public utility" was limited to investor-owned companies holding themselves out to serve the public generally to the exclusion of cooperatives or other persons not assuming such obligations. On the contrary, in a memorandum on the constitutionality of the proposed Part II of the Act, submitted to the Senate By Mr. DeVane (and Oswald Ryan, the FPC General Counsel), the argument was carefully stated in terms that "*most if not all* of the companies affected by the present bill are undoubtably organized as public utilities under laws of the States which created them. *Most, if not all of them,* have made use of the power of eminent domain . . ." Hearings on S. 1725, Public Utility Holding Company Act of 1935, before

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Senate Committee on Interstate Commerce, 74th Congress, 1st Sess., p. 803 (emphasis added). Moreover, if this view had been adopted by the Congress, there would have been no need for inserting into the Act the provisions of Section 201(f) expressly excluding federal or state instrumentalities (but significantly not cooperatives) from the regulator jurisdiction of the Commission under Title II.

3. The cooperatives' other principal argument is that the Federal Power Act should not be construed to confer jurisdiction over them because some state courts have held that cooperatives are not public utilities subject to the jurisdiction of state utility commissions. Obviously, state cases are not dispositive of the question whether co-ops are public utilities under the Federal Power Act, since the state laws are different in important respects from the Federal Power Act and since Federal, not state, law governs this question.¹⁶

The argument cannot be made that federal law should "follow" state law and exempt co-ops from regulation, because state law is not uniform. It runs the gamut from complete exemption of co-ops from regulation by state commissions,¹⁷ through exemption from certain aspects of state commission jurisdiction¹⁸ to complete subjection of co-ops to the jurisdiction of state commissions.¹⁹

The argument may be that the phrase "public utilities" in the Federal Power Act should be interpreted as exclud-

¹⁶Cf. *Waling v. Portland Terminal Co.*, 342 U. S. 197 (1952); *Jerome v. United States*, 318 U. S. 101 (1948); *Morgan v. Commissioner*, 307 U. S. 78, 80 (1940); *Burnet v. Harmel*, 287 U. S. 103 (1932).

¹⁷E.g., Ala. Code, Title 18 § 57 (1958); Fla. Stat. § 366.02.11 (1959); Ga. Code Ann., Title 34A §§ 131, 132 (1962); Purdon's Penna. Stat. Ann. Tit. 14, § 282 (1958).

¹⁸See, e.g., *Burns Ind. Stat. Ann.* § 55-4418 (1962 Supp.); *Boone County Rural Elec. Membership Corp. v. Public Service Comm'n.*, 129 Ind. App. 175, 155 N. E. 2d 149 (1958). See also N.M. Stat. Ann. §§ 68-3-2 (F) (1), 68-5-4.1 (1961); *id.* § 45-5-29 (1954).

¹⁹N.H. Rev. Stat. Ann. § 301.57 (1951), Mich. Rev. Stat. § 460.6 Colo. Rev. L. § 115-1-3 (b) (1961 Supp.). The Colorado statute overruled the decision of the Colorado Superior Court in *Public Service Co. v. Public Utilities Comm'n*, 142 Colo. 135, 350 P. 2d 543 (1960) holding co-ops exempt from Commission jurisdiction.

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ing co-ops because state cases construing that same phrase in state statutes have frequently held that it does not include cooperatives. See e.g., *Sutton v. Haneiker*, 75 Ida. 395, 272 P. 2d 1012 (1959); *Socorro Electric Cooperative, Inc. v. Public Service Co. of New Mexico*, 66 N. M. 343, 348 P. 2d 88 (1959);²⁰ *Colorado Public Service Co. v. Public Service Comm'n*, 142 Colo. 135, 350 P. 2d 543 (1960);²¹ *Inland Empire Rural Electrification v. Department of Public Service*, 199 Wash. 527, 92 P. 2d 258 (1939); *Garkane Power Co. v. Public Service Comm'n*, 98 Utah 446, 100 P. 2d 571 (1941). But, the state cases holding that co-ops are not "public utilities" were not decided in *vacuo*, but in the context of specific statutory definitions of "public utility," and, as will be seen, where the definition follows the same pattern as that in the Federal Power Act, the state courts have held the cooperatives to come within this term. The state definitions generally differ from the definition of public utility in the Federal Power Act. Thus, the Utah statute at issue in *Garkane Power Co. v. Public Service Comm'n*, 98 Utah 446, 100 P. 2d 571 (1941), upon which the co-ops rely heavily, states that the term "public utility includes every . . . electric corporation . . . where the service is performed for, or the commodity delivered to, the public generally." (Emphasis in original).

In the *Socorro Electric Cooperative* case, the preamble to the statute read:

"(A) Public utilities as hereinafter defined are affected with the public interest in that, among other things,

²⁰This decision was overruled by an amendment to the state statute explicitly making co-ops public utilities. N. M. Stat. Ann. § 68-3-2(f) (L) (1961 Supp.).

²¹This decision was overruled by subsequent amendment to the state statute explicitly making co-ops public utilities. Colo. Rev. L. § 115-1-3(b) (1961 Supp.).

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(1) A substantial portion of the business and activities involves the rendition of essential public services to large numbers of the *general public*. (Emphasis added).

(2) Their financing involves the investment of large sums of money, including capital obtained from many members of the general public.

• • • • • • •

(B) It is the declared policy of this state that the public interest, . . . and to the end that capital and investment may be encouraged and attracted so as to provide for the construction, development and extension of proper plants and facilities *for the rendition of service to the general public and to industry.*"

348 P. 2d at 89-90. (Emphasis in original).²² And, in *Inland Empire Rural Electrification Inc. v. Department of Public Service*, 199 Wash. 527, 92 P. 2d 258 (1939), while the court appears to have decided the case largely on the basis of abstract principles of utility law, the state statute defined a "public service company" as an "electric company" and an "electric company" as "every corporation operating or managing any electric plant *for hire* within this state." 92 P. 2d 258, 261. (Emphasis in original).

By contrast, in *Rural Electric Co. v. State Board of Equalization*, 57 Wyo. 451, 120 P. 2d 741 (1942) the statute defined "public utility" in terms much like those used in the Federal Power Act.

²²The Court also relied on the fact that the statute expressly exempted cooperatives from public service commission jurisdiction. On these grounds the court held that the public service commission was powerless to grant relief from a claimed encroachment on the co-op's territory, such relief being available only to "public utilities." This determination was overruled by the legislature. See footnote 18, *supra*.

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The state statute reads:

. . . . The term "public utility," when used in this chapter, shall mean and include every person, or municipality, that owns, operates, leases, controls, or has power to operate, lease or control:

* * * * *

(C) Any plant, property or facility for the generation, transmission, distribution, sale or furnishing to or for the public of electricity for light, heat or power, including any conduits, ducts or other devices, materials apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power; etc.

The Court held that under that language, co-ops were "public utilities."²² Like the Federal Power Act, and unlike the Utah, New Mexico, and Washington statutes the term "person" in the Wyoming statute is written in terms of the types of facilities the "person" owns or operates and not whether he holds himself out to serve the public "generally" or "for hire."

Not only are most of the state cases cited by the Co-ops and holding that they are not public utilities based upon statutes containing definitions of "public utility" distinguishable from the definition in section 201 of the Power Act, but also there are numerous cases in which state courts have held that co-ops are public utilities or public service corporations. See cases cited at notes 17-21, *infra*. The Co-ops rightly point out that many of the state cases holding that Co-ops are "public utilities" did not involve the question whether they were subject to state commis-

²²The court also relies upon a provision of the statute specifically requiring any "electrical . . . public utility operating for mutual benefit" to secure a certificate before constructing additional facilities.

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sion jurisdiction. This is hardly surprising. As we have seen, in many states where co-ops are active, legislatures have by statute either specifically exempted them from, or made them subject to some or all of the authority of the state commission. But the answers to a great many other questions not covered by these statutes may depend upon whether a Co-op is accorded or denied public utility status. These questions include the constitutionality of conferring eminent domain powers upon a Co-op,²⁴ whether it is subject to taxes levied upon "public utilities,"²⁵ whether it may exclude other electric companies from its service area,²⁶ and whether it must serve anyone willing to comply with reasonable membership requirements.²⁷ It is here that the state courts most frequently assign co-ops public utility status — even in the face of statutes exempting them from all or most of the state public service commission's jurisdiction.²⁸

Focusing on the rate jurisdiction of a state commission, on the other hand, some state courts which have had to decide whether co-ops should be subject to such regulation have invoked the doctrine of "mutuality" and exempted the co-ops. That doctrine is set forth most clearly in *Garkane*

²⁴*Bookhart v. Central Electric Power Cooperative*, 219 S. C. 414, 65 S. E. 2d 781 (1951); *Dairyland Power Cooperative v. Brennan*, 248 Minn. 556, 82 N. W. 2d 56 (1957); *Alabama Power Co. v. Cullman County Electric Membership Corp.*, 234 Ala. 396, 174 So. 866 (1951).

²⁵*Rural Electric Co. v. State Board of Equalization*, 57 Wyo. 451, 120 P. 2d 741 (1942).

²⁶*Kosciusko County Rural Electric Membership Corp. v. Public Service Commission*, 225 Ind. 668, N. E. 2d 572 (1948).

²⁷*Alabama Power Co. v. Cullman County Electric Membership Corp.*, 234 Ala. 396, 174 So. 866 (1951); *Jordan v. Clarke-Washington Electric Membership Co-op*, 262 Ala. 527, 80 So. 2d 527 (1953); *Capital Electric Power Ass'n v. McGuffee*, 226 Miss. 227, 83 So. 2d 837 (1955); See *Hagane v. Escambia Electric Membership Corp.*, 207 Ga. 53, 60 S. E. 2d 162 (1950); *Kosciusko County Rural Electric Membership Corp. v. Public Service Commission*, *supra*; *Bookhart v. Central Electric Power Cooperative*, 219 S. C. 414, 65 S. E. 2d 781 (1951). See generally, *Annot.* 56 A.L.R. 2d 413 (1957).

²⁸See, e.g., *Alabama Power Co. v. Cullman County Electric Membership Corp.*, *supra*, note 20; *Bookhart v. Central Electric Power Cooperative*, *supra*, note 20.

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Power Co. v. Public Service Comm'n, 98 Utah 460, 100 P. 2d 571, 573 (1940). The court wrote:

In a cooperative the principle of mutuality of ownership among all users is substituted for the conflicting interests that dominate the owner vendor-non owner vendee relationship. In a cooperative all sell to each. *The owner is both seller and buyer . . .* (Emphasis supplied).

Viewed realistically, the identity of a co-op with its members is a short-hand way of expressing a more complex notion: that the interests of a co-op's management and its customers are so nearly the same that no regulation is required to mediate between them in order to assure proper, economical service.²⁹ In this respect, a co-op is sometimes contrasted with a public service corporation, whose management is assumed to be concerned with profits for stockholders as well as with service to customers.

But the assumed identity of the interests of a co-ops managers and members does not throw any light on many other questions bearing on a co-op's status as a utility, which do not involve the co-ops relations with members. And this Commission's jurisdiction also involves matters essentially unrelated to transactions between a co-op and its members. Thus, the persuasiveness of the state cases holding that co-ops are "public utilities" is enhanced, not lessened, by the fact that most of these cases involve questions other than whether co-ops are subject to state public service commission jurisdiction. And the cases holding that co-ops are exempt from state utility commission jurisdiction by virtue of the "mutuality" doctrine are really not in point.

²⁹See, *Inland Empire Rural Electrification, Inc. v. Department of Pub. Serv.*, ___ Wash. ___, 92 P. 2d 258, 262-63 (1939); *Garkane Power Co.*, 98 Utah 460, 100 P. 2d at 573.

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But the assumed identity of the interests of a co-ops managers and members does not throw any light on many other questions bearing on a co-op's status as a utility, which do not involve the co-ops relations with members. And this Commission's jurisdiction also involves matters essentially unrelated to transactions between a co-op and its members. Thus, the persuasiveness of the state cases holding that co-ops are "public utilities" is enhanced, not lessened, by the fact that most of these cases involve questions other than whether co-ops are subject to state public service commission jurisdiction. And the cases holding that co-ops are exempt from state utility commission jurisdiction by virtue of the "mutuality" doctrine are really not in point.

²⁰See, *Inland Empire Rural Electrification, Inc. v. Department of Pub. Serv.*, ___ Wash. ___, 92 P. 2d 258, 282-83 (1939); *Carcione Power Co.*, 98 Utah 460, 100 P. 2d at 572.

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²⁸See, e.g., *Alabama Power Co. v. Cullman County Electric Membership Corp.*, *supra*, note 20; *Bookhart v. Central Electric Power Cooperative*, *supra*, note 20.

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²⁹See, *Inland Empire Rural Electrification, Inc. v. Department of Pub. Serv., ___ Wash. ___*, 92 P. 2d 258, 262-63 (1939); *Garkane Power Co.*, 98 Utah 460, 100 P. 2d at 573.

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In sum, I believe that the language of the Federal Power Act, as further elucidated by its legislative and administrative history, clearly supports the conclusion previously reached by the Commission that cooperatives and other borrowers from the REA are public utilities within the meaning of section 201(e), if such persons own or operate jurisdictional facilities.

II

DOES THE COMMISSION HAVE AUTHORITY UNDER SECTION 204 OF THE FEDERAL POWER ACT TO PASS UPON LOANS BY THE REA TO PUBLIC UTILITIES AS A CONDITION PRECEDENT TO THE UTILITY OBLIGATING ITSELF?

The fact that borrowers from the REA may be "public utilities" within the meaning of section 201(e) of the Federal Power Act does not answer the question whether such utilities must secure Commission approval pursuant to Federal Power Act section 204 before issuing notes to the REA.³⁰ Section 204 provides: "No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety, or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability." This language, standing alone, could be read as conferring jurisdiction upon the Commission over notes issued to a government agency like REA, since section 3(16) of the Act defines "security" as "any . . . evidence of . . . indebtedness of a corporation subject to the

³⁰A cooperative would in any event not need Commission approval of an initial loan since as of that time it would neither own nor operate jurisdictional facilities. This would be true also of a new G & T "super-co-op" formed by a number of existing distribution utilities, unless, as I understood is not typically the case, a member co-op itself issued a note or other certificate of indebtedness to the REA. And, of course, no co-op would be subject to Commission jurisdiction if its security issues were subject to prior approval by a State Commission.

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provisions of the Act." But for reasons set forth below I do not believe the Federal Power Act properly can be read to give the Commission such authority merely because it can be spelled out from the literal language of the statute. I reach this conclusion because (1) unlike analogous statutes there is no express authorization for the Commission to review or approve the lending functions of the REA, and (2) such action, unlike its exercise of jurisdiction over cooperatives under the other provisions of Titles II and III of the Act, would be basically inconsistent with the exercise of the broad discretion Congress intended to delegate to the REA Administrator.

1. The REA Act is silent on the question whether REA loans to "public utilities" are subject to approval by the FPC. This silence may reflect Congress' failure in 1935 to recognize that borrowers from the REA would one day own facilities for the interstate transmission or sale for resale of energy which would make them subject to the Federal Power Act. But Congress' silence does not end the inquiry. For where Congress intends one agency of the federal government to review the performance of another agency, it normally says so specifically.³¹ This is especially so where one agency must approve loans to be made by another. The most directly analogous situation is that involving the Interstate Commerce Commission. Since 1920, it has had authority under section 20(a) of the Interstate Commerce Act over the security issues of railroads equivalent to this Commission's jurisdiction over security issues of public utilities. In fact, section 204 of the Power Act was patterned after section 20(a) of the

³¹See *Chapman v. El Paso Natural Gas Co.*, 204 F. 2d 52 (1953); Federal Power Act § 4(e) (approved by Chief of Engineers and Secretary of Army required before Commission issues licenses); Bonneville Act § 5(a), 50 Stat. 781 (1937) (Bonneville Administrator's contracts for wholesale sales of electric energy subject to FPC rate approval); Flood Control Act of 1944 § 5, 58 Stat. 890 (1947) 16 U.S.C. 825a (1958) (same with respect to Secretary of the Interior).

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Interstate Commerce Act. Yet, when Congress established the Reconstruction Finance Corporation in 1932, it expressly wrote into that Act a provision making RFC loans to railroads subject to prior ICC approval.²² The legislative history of the Reconstruction Finance Act shows that the Chairman of the ICC testified at the hearing that under section 20(a) of the Interstate Commerce Act any RFC loan to railroads would have to be approved by the ICC even though the RFC Act was silent on the matter. Hearings Before Senate Subcommittee of the Committee on Banking and Currency on S. 1, 72nd Cong., 1st Sess., 120-22 (1931). But some Senators and some of the other witnesses doubted this would be the case, See *id.*, at 119-20, 141-42, and accordingly a special provision was written into the RFC Act, Reconstruction Finance Act §5, 47 Stat. 6 (1932).

The Civil Aeronautics Act provides another illustration of Congress' practice of making explicit its intent to give an agency authority to pass upon loans made by another agency. Section 410 of the Federal Aviation Act of 1958, 72 Stat. 769, 49 U.S.C. 1380 (1958) provides:

The Board is empowered to approve or disapprove, in whole or in part, any and all applications made after the effective date of this section for or in connection with any loan or other financial aid from the United States or any agency thereof to, or for the benefit of, any air carrier. No such loan or financial aid shall be made or given without such approval, and the terms and conditions upon which such loans or financial aid is provided shall be prescribed by the Board.

So too, this Commission must approve TVA loans to States, counties, municipalities and non-profit organizations made pursuant to the TVA's statutory authority.

²²Reconstruction Finance Act § 5, 47 Stat. 6 (1932).

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Section 15c, 53 Stat. 1083 (1939), amending Tennessee Valley Act §15, 48 Stat. 67 (1933), 16 U.S.C. 831 (o) (1958). Here again, reviewing authority has been expressly conferred.

The light of Congress' practice of making explicit its intent that one agency review the determinations of another—especially determinations to make loans pursuant to statutory authority granted the lending agency—and the absence of any explicit direction to the Commission to review REA loans, I conclude that no such review was intended.

The legislative history of the REA Act buttresses this conclusion. The Act as finally passed (see 49 Stat. 1364) contained a provision (section 3) authorizing the Reconstruction Finance Corporation to make loans to the REA Administrator up to the amount of \$50,000,000 for a period expiring on June 30, 1937. When an amendment to the bill to achieve this objective was introduced in the Senate, Senator Norris, the Senate spokesman, was asked whether the RFC would exercise any control over the REA Administrator's discretion in making loans. He responded that "[t]he judgment of the Rural Electrification Administrator is the judgment that would prevail" (80th Cong., Rec. 3237).³³ See also 80 Cong. Rec. 3308, 5281. The entire attitude of Congress was, in the words of Representative Rayburn—

³³The colloquy in full reads as follows:

MR. McNARY. I recall the authority granted to the Administrator in the original bill. In this amendment I understand it is provided that for 2 years the money is to be borrowed from the Reconstruction Finance Corporation by the Administrator. Then the question naturally arises, whose judgment would be followed as a business proposition?

MR. NORRIS. There is not any doubt about that. I am not trying to conceal anything.

MR. McNARY. No; I appreciate that.

MR. NORRIS. The judgment of the Rural Electrification Administrator is the judgment that would prevail.

MR. McNARY. Then does the amendment fit into the philosophy of the act creating the Reconstruction Finance Corporation?

MR. NORRIS. I would not say that it does or that it does not. To my mind, that is immaterial.

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the House spokesman on the bill, to "lodge this power [to make loans for rural electrification] in one man's hands" in full recognition of the "great power that was [thus] given to the Administrator" (80 Cong. Rec. 5281). And as indicated, *supra*, pp. 19-20, in subsequent efforts to expressly give the FPC the responsibility to approve REA loans, there was no suggestion in the congressional reports or debates that the Commission had any existing authority, under section 204 or otherwise, to pass upon the propriety of the loan proposed to be made by the REA Administrator.

2. Despite the above, I would be reluctant to conclude that the Commission lacked any authority to approve the security issues of public utilities constituting notes or other indicia of obligation given to the REA, if this authority could be exercised by the Commission without interfering with the operations of the REA Administrator in carrying out his tasks under the REA Act. I think it is clear, however, that no such accommodation is possible. Either the standards by which the Commission under section 204 must evaluate a public utilities' proposed borrowing are the same as those by which the REA must determine whether to make a loan—in which case the Commission would be acting merely to review action of a cognate agency of the government, with the consequent delay—or the standards for Commission approval of borrowing are different from those under which the REA lends—in which case the Commission's exercise of authority could thwart Congressional policy as set out in the REA Act. I see neither necessity nor grounds for interpreting our Act in a manner which would achieve either such objective.

This aspect of the problem can, I believe, best be approached by examining the scope of the Commission's authority under section 204, as most definitely set forth in *Pacific Power & Light Co.*, 27 F.P.C. 623. In that case the

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Commission stressed that its authority under section 204 did not extend to the type of public interest considerations which would have been appropriate if it had been given certificate authority over the construction of facilities by public utilities³⁴ but instead was directed to insuring that the company expenditures were related to the improvement, extension or development of the utility system and did not involve improper financial practices—excessive interest rates and underwriting charges, lopsided capitalization, etc. Accordingly, in *Pacific Power & Light* the Commission refused to consider whether approval of a security issue should be withheld because the funds were to be utilized in part for a transmission line capable of being converted into 500-kv tie line, which arguably should be built by the federal government rather than the private companies involved. As the Commission stated (*id.*, at 628):

Whether a publicly owned interconnection should be constructed, whether such interconnection would meet the growing demand for power in the region and thus remove any economic justification for Applicant's proposed expansion of the inter-tie, and whether Bonneville power should be made available to Applicant for transmission to California are not for us to decide. It is not for this Commission to exercise the role of Congress as arbiter of these competing claims. That responsibility Congress has yet to delegate.

This ruling is significant here. It is arguable that the Commission should have authority to disapprove loans to co-ops to prevent them from constructing uneconomic or

³⁴"The surveillance exercised by the Commission under Section 204 is far more limited in scope than we would exercise if, for example, we were issuing certificates of public convenience and necessity." 27 FPC at 626. "Section 204 . . . [is a] particularly unsuitable vehicle for comprehensive licensing-type regulation such as that exercised by this Commission under the Natural Gas Act." (*ibid.*)

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duplicative facilities. But it seems clear that such authority could only be assumed by the Commission at the expense of inserting itself into policy matters which Congress has delegated to the REA Administrator, subject only to review by the Congress itself in making its annual appropriations for REA loan-funds.²⁵

It is true that the Administrator is given no special directive to conduct his program in the interests of the overall national power picture—his mission is simply “to make loans for rural electrification . . . for the purposes of financing the construction and operation of generating plants, electric transmission and distribution lines and systems for furnishing of electric energy to persons in rural areas . . .” (Rural Electrification Act of 1935, as amended, §4, 7 U.S.C. 904). The Administrator may thus be in a position to make a loan which he conceives to be in the interests of rural electrification, but which the Commission might believe from its vantage point is for an unnecessary or uneconomic project. But, if it had veto power over REA loans, the Commission would be in a position to forestall construction of projects the Administrator believed essential. And the Commission in making its determination would necessarily be called upon to determine the policy question whether rural electrification should be encouraged by low interest government loans in situations where investor-owned companies could provide the needed facilities. I see no more reason for believing that this was the intent behind section 204, than was the resolution of the public-private power controversies which the Commission held to be beyond its competence in *Pacific Power & Light*, supra.

²⁵To aid this review the REA Administrator now, pursuant to resolution of the Appropriations Committee, regularly makes information available to Congress as to his loan activities. See Sen. Rep. 474, 80th Cong., 1st Sess. 12 (1947).

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There will of course, be many aspects of a cooperative's financing which clearly are within the Commission's frame of reference in section 204 cases. It is obvious, however, that many of the problems with respect to private financing—prevention of excessive interest or underwriting rates, the need for competitive bidding, etc.,—simply are not applicable to REA loans. Nor are normal concepts of the proper security structure of a public utility or the proper period within which to repay the loan—the REA cooperative will almost always be 100% debt financed and the REA Act itself requires that the loans be repaid within 35 years. About the only question normal to a section 204 proceeding which the Commission could consider with respect to an REA loan would be whether the proposed project was self liquidating so that the borrower could be expected to pay off its obligations within the fixed period. Commission action in this sphere would merely be duplicative of the Administrator's.

3. It may be suggested that the logic of this argument must be to deprive the Commission of *all* jurisdiction over persons who are REA borrowers. This clearly does not follow. For no provision of Part II or III of the Act giving the Commission jurisdiction over public utilities conflicts with the REA Administrator's statutory functions. Certainly his activities are not interferred with because a borrower, who is also a "public utility" within the meaning of section 201(e), is subject to the restricted interconnection and service provisions of sections 202(b) and 207.³⁶

³⁶Since the Commission, in ordering interconnections under Section 202(b), may not place an undue burden on a public utility, nor compel the enlargement of its generating facilities, nor impair its ability to render adequate service to its existing customers, it is clear that the Administrator's security cannot be impaired. The same is true of Section 207 which authorizes the Commission, upon complaint of a state Commission, to order a public utility to provide more "adequate" or "sufficient" service only where enlargement of generating capacity or impairment of its ability to render adequate service to existing customers is not compelled.

Opinion of the General Counsel, Etc.

or, if it makes sales of energy in interstate commerce for resale, is subject to the rate requirements of sections 205 and 206.³⁷ Nor is there any inconsistency between the statutory functions of the REA and the Commission's authority under section 301 to prescribe a uniform system of accounts for borrowers who are public utilities, under section 302 to establish rules of depreciation or under section 208 to ascertain the actual legitimate cost of the property.

The only provision of Part II or III (outside of section 204) which could involve action by both the Commission and the REA is section 203 requiring approval of a public utilities disposal of jurisdictional facilities valued in excess of \$50,000, the merger or consolidation of such facilities with any other person or the acquisition of the security of any other public utility. Section 7 of the REA Act, 7 U.S.C. 907, precludes any REA borrower whose loan has not been repaid in full from selling or disposing of its property, rights or franchises without the approval of the Administrator. Accordingly, under some circumstances an REA borrower would have to secure the approval of both agencies. But it is difficult to see how this minor degree of duplication could seriously interfere with the program of either the REA or the Commission since in both cases the agency is given authority solely to insure that its statutory objectives are not harmed by an ill-advised disposition. Thus, if either the REA or the Commission disapproves a proposed disposition for reasons pertaining to its responsibility, this action would not adversely affect the other agency, even if it had in the meantime approved the proposal.³⁸

³⁷While "super-co-ops" would have to file the rates they charge their distributor members for resale to their members, the Commission in considering the justness and reasonableness of such rates would be obligated to consider the co-ops obligation to secure revenues sufficient to repay its loan within the statutory prescribed period.

³⁸In fact a number of the cases in which the Commission in the past has asserted jurisdiction over REA co-ops involved sales of REA facilities to other utilities. See p. 18, *supra*.

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I conclude therefore that exercise of the Commission's authority under section 204 to review loans made by the REA to public utilities is neither required by the language of the Act nor consistent with the overall statutory scheme established by Congress.

(s) Richard A. Solomon
General Counsel
Federal Power Commission

May 20, 1963

BRIEF FOR INTERVENOR.

IN THE

United States Court of Appeals

For the District of Columbia Circuit

No. 21375

CITY OF PARIS, KENTUCKY, - - - Petitioner,

versus

FEDERAL POWER COMMISSION, - - Respondent,

AND

KENTUCKY UTILITIES COMPANY, - - Intervenor.

On Petition to Review an Order of the
Federal Power Commission.

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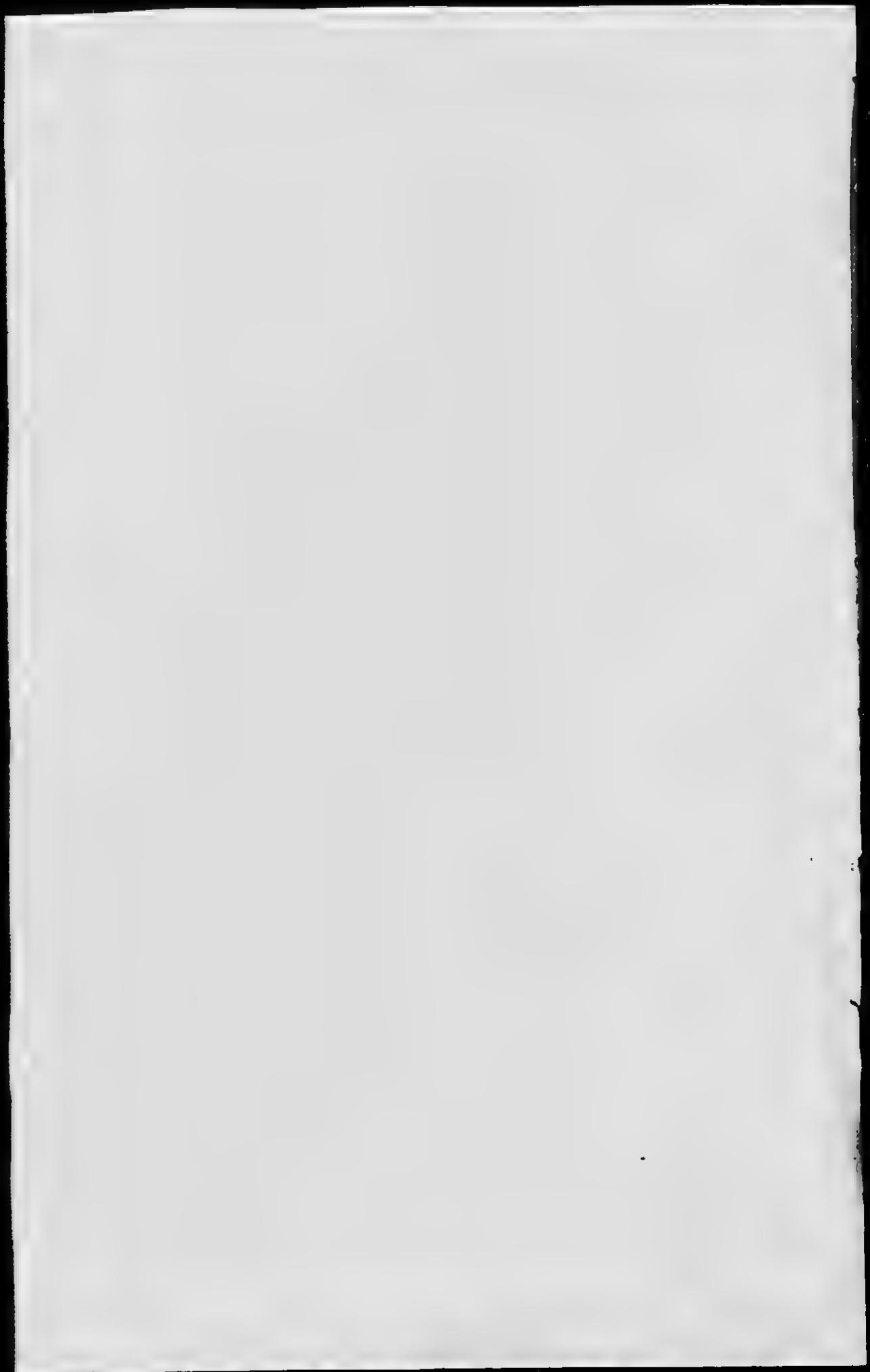
United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 8 1968

Nathan J. Paulson
CLERK

March 11, 1968.

WESTFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.



STATEMENT OF QUESTIONS PRESENTED.

In the opinion of intervenor, the Questions are:

- I. Is the Finding of the Federal Power Commission—that "The establishment of a physical connection between the transmission facilities of KU and Paris and the sale of energy to Paris is necessary and appropriate in the public interest"—supported by substantial evidence and correct?
- II. Does the Federal Power Commission lack statutory authority to compel an investor-owned electric utility, over its objection, to transmit (wheel) power for a competing electric utility, even if such competing utility is not a municipality or a government instrumentality or other entity not subject to jurisdiction of the Federal Power Commission under the provisions of Part II of the Federal Power Act?
- III. Does the Federal Power Commission lack statutory authority to compel an investor-owned utility to wheel power between, and for the benefit of, a municipally-owned electric system and an REA-financed cooperative?

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* Cases and Statutes chiefly relied upon are marked by asterisks.

IN THE
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 21375

CITY OF PARIS, KENTUCKY, - - - *Petitioner,*

v.

FEDERAL POWER COMMISSION, - - - *Respondent,*
AND
KENTUCKY UTILITIES COMPANY, - - - *Intervenor.*

ON PETITION TO REVIEW AN ORDER OF THE
FEDERAL POWER COMMISSION.

BRIEF FOR INTERVENOR.

COUNTER-STATEMENT OF THE CASE.

The Brief filed in the name of petitioner, City of Paris, demonstrates that the real controversy underlying this proceeding is not between intervenor, Kentucky Utilities Company (KU), and Paris.

East Kentucky Rural Electric Cooperative Corporation (East Ky) is a generation and transmission cooperative organized under Kentucky law and operating only in Kentucky. Although invited by the Federal Power Commission (the Commission, or sometimes FPC) to become a party to the proceeding before the Commission, East Ky did not accept such invitation. As will be developed in detail hereafter, however, the proceeding in the name of Paris

has been for the principal benefit of East Ky, and the controversy here is between KU and East Ky, not Paris.

Following the decision of the Commission, KU and Paris entered into a contract pursuant to which KU is now supplying and will continue to supply the power needs of Paris until September 30, 1972, and thereafter until termination by either party on three years' prior notice. Despite such fact, the lawyer for Paris in this one matter, who is the General Counsel of East Ky,¹ has brought this action for review—for the sole purpose of having this Court reconsider the status of REA-financed coops before the Federal Power Commission. Throughout the Argument portion of his Brief, the Court will find only a few, completely incidental references to Paris. The entire Brief is concerned with REA coops, including East Ky, although there was not a single coop party to the proceeding below.

In the first two points set forth in the argument in the Brief for petitioner, it is contended that (a) REA-financed cooperatives are public utilities under the Federal Power Act and (b) the legislative and administrative history of the Act imply that the Commission has jurisdiction over cooperatives. It is submitted that these contentions, asserted as grounds for reversing the Commission, have been foreclosed by the decision of this Court in *Salt River, etc. Power District v. F. P. C.*, No. 20,960, decided February 15, 1968.

Further statement of the facts is set forth under the First Point of the Argument hereafter.

¹R. 204-5.

STATUTES PRINCIPALLY INVOLVED.

The statutes principally involved are §§ 201(e),¹ 201(f),² 202(a)³ and 202(b)⁴ of Part II of the Federal Power Act (the Act), all of which are set out in the Appendix to petitioner's Brief.

SUMMARY OF ARGUMENT.

Paris made two requests of the Commission: (1) that the Commission file and approve a purported power exchange and supply agreement between Paris and East Ky and (2) that the Commission compel KU to interconnect KU's transmission line in Paris to the Paris electric system and thereafter transmit, or wheel, between Paris and East Ky the energy to be purchased and exchanged between them under their agreement. The Commission denied each of Paris' requests.

As a basis for rejection of both requests, the Commission asserted its lack of jurisdiction over the activities of both municipalities and REA-financed cooperatives—as to the latter, citing the Commission's decisions in the *Dairyland*⁵ and *Salt River*⁶ cases. The Commission's lack of jurisdiction over Paris, a Kentucky municipality, is unquestioned. By its February 15, 1968 decision in the *Salt River* case, this Court affirmed the Commission's conclusion that it has no jurisdiction over REA-financed coops, including East Ky.

¹Petitioner's Appendix 8a.

³Ibid.

²Ibid.

⁴Id. 9a.

⁵*Dairyland Power Cooperative, et al.*, Opinion No. 511, January 5, 1967, 37 F.P.C. 12 (1967).

⁶*Salt River, etc., Power District*, FPC Docket No. E-7306, Order of January 6, 1967, 37 F.P.C. 68 (1967).

As a further basis for rejection of Paris' request that KU be compelled to interconnect with Paris and thereafter wheel energy back and forth between Paris and East Ky, the Commission held that "it is clear that the Commission cannot compel a private utility to transmit the power of government instrumentalities under Part II of the" Act—citing pertinent legislative history. It is clear from the particular history cited by the Commission, and from other of the legislative history relative to the same point, that the Commission was here using "government instrumentalities" broadly to include municipalities, cooperatives and all types of public power projects enjoying tax exemptions, taxpayer-subsidized financing and other such competitive advantages over the private utilities. Not only does the legislative history of the Act fully support the Commission's conclusion that it has no authority to compel a private utility to wheel power of, and for the benefit of, municipalities such as Paris and REA cooperatives such as East Ky, the legislative history conclusively establishes that the Commission has no authority under the Act to compel a private utility to wheel power for any kind of entity, whether another private utility, a municipality or a cooperative or any other kind of government instrumentality.

Having correctly concluded that it was without statutory authority to grant either of Paris' requests, the Commission could have simply dismissed Paris' Complaint. It did not do so. It made an affirmative Finding that it is necessary and appropriate in the pub-

lie interest that KU interconnect with and sell energy to Paris; and the Commission ordered KU to do both of these things.

Although the Commission's Order had no binding effect whatever upon Paris, shortly after entry of the Order Paris voluntarily entered into a contract with KU and is now obtaining its power requirements from KU. Although not discussed in petitioner's Brief, the correctness of the Commission's conclusion—that it is necessary and appropriate in the public interest that KU serve Paris—is an additional ground upon which the Commission's Order should be affirmed.

Since consideration of the matter of the public interest will entail a comprehensive statement of the facts, this point will be discussed first.

ARGUMENT.

I

The Commission's Finding—that "The Establishment of a Physical Connection between the Transmission Facilities of KU and Paris and the Sale of Energy to Paris Is Necessary and Appropriate in the Public Interest"—Is Supported by Substantial Evidence and Is Correct.

Section 202(b) of the Act is, in pertinent part, as follows:

"(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity

for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility * * * to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons * * *. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them."¹

Under this Section, Paris sought an order of the Commission directing KU to permit interconnection of Paris' electric system to a 69 KV transmission line of KU at a point inside the City. Paris further sought an order compelling KU, over its objection, to use such interconnection, not for the purpose of selling energy to or exchanging energy with Paris, but for the purpose of wheeling energy between the systems of East Ky and Paris so as to make possible the performance by East Ky and Paris of a power exchange and supply agreement they had purportedly entered into.

KU answered the Complaint, stating KU's willingness, and in fact desire, to interconnect with Paris and to supply all of Paris' requirements for energy, or exchange power and energy with Paris under the terms of an agreement which Paris had theretofore submitted to KU and KU had unconditionally accepted,

¹Emphasis wherever appearing has been added.

or upon the basis of any other terms acceptable to Paris and KU and approved by the Commission.

After development of an extensive record, the Commission ordered the interconnection between the facilities of Paris and KU's transmission line in Paris, and further ordered that KU

"* * * thereafter shall sell and supply energy to Paris under the rate schedule, as supplemented, offered to Paris and entered in the record as Annex A and Annex B to the Paris complaint and as Exhibit No. 2 of Kentucky Utilities Company."¹

Under § 202(b) of the Act, the Commission cannot order such interconnection and sale or exchange of energy unless the Commission, after notice to each State commission and utility affected and after opportunity for hearing, "finds such action necessary or appropriate in the public interest."

In its Opinion and Order under review, the Commission first emphasized that its order to KU, not only to interconnect, but also "to provide service directly to Paris" was "dependent upon * * * a finding that such action is necessary or appropriate in the public interest."² After observing that "The record is adequate in all respects,"³ the Commission made the following express Finding:⁴

"The Commission further finds:

* * * * *

"(3) The establishment of a physical connection between the transmission facilities of KU and

¹Petitioner's Appendix 6a.

²*Id.* 5a.

³*Id.* 4a.

⁴*Id.* 6a.

Paris and the sale of energy to Paris is necessary and appropriate in the public interest * * *."

It is immaterial whether such Finding of the Commission is considered a finding of fact under § 313(b) of the Act¹ which, if supported by substantial evidence, is conclusive. The Finding is unquestionably correct, and its correctness is not challenged by Paris in this Court.

Paris is a Kentucky municipality of the fourth class, owning and operating an electric generating plant consisting of five small diesel generating units and a distribution system serving about three-fourths of the City. The electric load of the Paris system is in excess of the firm capacity of the system, so that Paris requires an additional or outside source of power in order to supply the needs of its customers.

KU is an investor-owned electric utility organized under the laws of Kentucky, owning and operating generating, transmission and distribution facilities throughout a large part of Kentucky, and subject to the jurisdiction of the Public Service Commission of Kentucky (the Kentucky Commission). It has the ability and capacity to serve all types of loads, including the Paris load. Paris is in the heart of KU's electric service area. Since 1923, KU has owned and operated an electric distribution system in, and in the vicinity of, Paris, which distribution system presently serves about one-fourth of the customers in Paris and some 2,500 customers outside, but in the immediate

¹Petitioner's Appendix 20a.

vicinity of, Paris. As the result of an election among the citizens of Paris in 1957, KU has a franchise to maintain and operate its distribution system within the City, which franchise will not expire until 1977.

KU has, within the City, both a 69 KV transmission line which affords a two-way power feed to the Paris area, and a 33 KV transmission line affording still another source of power in the event of emergency. In contrast, the nearest facility of East Ky to Paris is a 69 KV line, passing through the County in which Paris is situated, about nine miles from Paris. No other utility serves the area.

It is admitted that the small diesel generating units of Paris are so inefficient that the cost to Paris of obtaining energy from those units and purchasing only needed additional requirements would be far in excess of the cost of purchasing from either KU or East Ky the entire energy requirements of the Paris system.

East Ky is a rural electric cooperative corporation owning and operating two generating plants and a system of transmission lines supplying the distribution systems of its member coops in central, southern and eastern parts of Kentucky, all of which were constructed with funds loaned by the Administrator of the Rural Electrification Administration at a 2% interest rate, under provisions of the Rural Electrification Act of 1936 (7 U. S. C. §§ 901-915). As set forth in the Act authorizing such loans, their purpose is the furnishing of electric service to rural areas not receiving central station service. The REA Act (7 U. S. C. §§ 904, 913) denies to the Administrator power to make

loans to a cooperative to serve communities having populations in excess of 1,500. The population of Paris is approximately 8,000.

Under applicable provisions of the *Kentucky Revised Statutes* (§§ 278.010 *et seq.*), East Ky is subject to the jurisdiction of the Kentucky Commission. In appropriate proceedings, the Kentucky Commission stated its policy that

"East Ky will not furnish nor deliver electric service directly or through its Members to any incorporated municipality not now receiving REA service and will so limit the use of power it supplies its Members in its power contracts with them."¹

Thus, service of Paris by East Ky would be contrary to the announced policy of the Kentucky Commission.

The Kentucky Commission intervened in the proceeding before the Federal Commission, filing therein its Notice of Intervention² and a Memorandum Brief in which it asserted its jurisdiction over the question of whether KU or East Ky is to supply the requirements of the Paris system, and its policy "that East Ky and its member distribution coops should not sell electricity to municipalities."

It might be inferred from statements in petitioner's Brief (pp. 3, 4) that KU had declined to supply the needs of Paris and that Paris was forced to turn to East Ky and then to the Commission in order to have its requirements met. Such is not the case.

¹Exhibit 7, R. 792.

²R. 1895.

Paris and KU negotiated intermittently toward a power supply contract, during much of the 1950s. During this time, KU offered to Paris a number of different proposals on different bases, but no contract was agreed upon.

Finally, with a transmittal letter dated March 12, 1965, Paris submitted to KU a definitive contract, the letter stating that Paris expected an acceptance or rejection of the proposal by March 22, 1965. On March 22, 1965, KU advised its unqualified acceptance of the contract. After several months of inaction, however, the individuals acting for Paris raised various objections to their own proposed contract and it was never signed. It is significant that the Mayor pro tem of the City, and one of its Commissioners, testified that,¹

"Well, some of us were inclined to go along with the KU proposal at that time. However, upon more careful consideration and after advice and consultation with our engineers and our attorneys we decided the proposed contract was not sufficiently clear in a number of respects * * *."

Again, he testified as follows:²

"In very recent months we have obtained the services of Lewis and Associates in engineering and Mr. Ardery as special utilities counsel. In the negotiations that passed back and forth between the City, Kentucky Utilities Company and East Kentucky RECC we were relying heavily upon the advice of our engineers and attorneys.

¹R. 120.

²R. 132.

We weighed very carefully the alternatives confronting the City as they were explained to us by the engineers and attorneys."

The attorney for Paris, Mr. Ardery, is General Counsel of East Ky. The engineer, Mr. Lewis, is employed as an engineer by Kentucky Statewide RECC and by some of the distribution coops in Kentucky.¹

Under these circumstances, the position taken by Paris throughout this matter has been necessarily influenced by the interests of East Ky.

Thus it is that, after proposing a definitive contract to KU, and after KU's unqualified acceptance of that contract, Paris declined to go forward with the contract with KU and, instead, undertook to enter into a contract with East Ky—despite the unquestioned fact that, as to be next noted, the contract with KU offered Paris its power and energy requirements at substantially less cost than under the contract sought to be entered into with East Ky.

After Paris declined to go forward with a contract with KU, KU, in an effort to meet objections raised on behalf of Paris, agreed to further modifications of the proposal in respects favorable to Paris.

Under the proposed contract with KU, Paris could have saved in the year 1966, alone, \$68,337, as against the cost to Paris of supplying its needs by operation of its own generating facilities. Comparing the cost to Paris of supplying all of its needs under the proposed contract with KU, as against the cost to Paris under the contract it undertook to enter into with East Ky,

¹R. 200, 204, 205.

Paris would save under the KU arrangement \$123,-819 over the first five-year period, or \$235,651 over a ten-year period or \$438,615 over a twenty-year period.¹

These facts led the Commission to observe in its Opinion² that, "Paris may prefer service from East Ky, and may even be willing *to pay more for it.*" These facts unquestionably weighed heavily with the Commission, however, in making its finding that it is "necessary and appropriate in the public interest" that KU, not East Ky, sell energy to Paris.

Thus far, we have not alluded to the comprehensive and excellent Decision of the FPC Examiner who presided over the Commission hearings. While his Decision is set out fully in the Joint Appendix, since the full Decision deals with matters no longer in the case, those portions of continuing significance are again reproduced as an Appendix hereto. Frequent reference to this Decision will be made in the following summary of reasons why the Examiner, and later the Commission, correctly concluded that it is necessary and appropriate in the public interest that KU, and not East Ky, supply the requirements of Paris.

The Interest of Paris.

While the "public interest" is broader than merely the interest of Paris in the question of whether its electric requirements are to be supplied by KU or East Ky, the interest of Paris is to be considered. Both the Ex-

¹Exhibit 3, R. 779.

²Petitioner's Appendix 5a.

aminer and the Commission gave careful consideration to the interest of Paris.

Thus, the Examiner observed that both the Commission Staff and counsel for Paris recognized that Paris' cost of power would be less if obtained from KU than from East Ky,¹ and that, over the first five years, Paris would save \$123,819 by purchasing from KU rather than East Ky.² From the standpoint of service reliability, the Examiner pointed out that, served by KU, Paris will "have available not only a dependable two-way supply of energy over KU's existing 69 kv transmission line but would have an additional emergency supply through KU's 33 kv line."³

This Court might understandably inquire why, then—if Paris' interest so clearly dictated service by KU—did Paris seek before the Commission to obtain its power from East Ky. Because this reaction is a natural one—and because, if not explained, it has a tendency to weaken the fair conclusion—we feel justified in again observing that Paris was being represented by and was acting upon the advice of East Ky's General Counsel. That this is of genuine significance is evidenced by the fact that the impartial FPC Examiner, who had ample opportunity in a number of conferences and hearings to observe the parties, was moved to state in his formal Decision:⁴

"It appears to the Examiner that the position taken by Paris in this proceeding may have been influenced by the interests of East Ky."

¹Appendix 7a.

²Id. 10a.

³Id. 14a.

⁴Ibid.

Nor did he stop with that bare observation. He next quoted the testimony of Paris' Mayor pro tem and Commissioner (set out on p. 11, *supra*) to the effect that Paris was relying heavily upon the advice of its engineers and attorneys, following which he noted:¹

"The engineer involved is presently employed as an engineer for Kentucky Statewide RECC and other cooperatives in Kentucky. Paris' special counsel is East Ky's General Counsel."

In setting out the Mayor pro tem's testimony on pp. 11-12 of this Brief, above, we have emphasized only those portions which the Examiner emphasized by underlining, when he quoted them in his Decision.

Invasion of Territory Served by KU.

It has been established for years that competition in the electric utility industry is not the means to most efficient and economical service to the rate payers. The facilities necessary for the supply of good service require capital investment per dollar of revenue produced in excess of that required in any other industry. Duplication of facilities and division of revenues are wasteful and inefficient and result in higher costs and less dependable service for the customers.

Accordingly, the policies underlying both Federal and Kentucky regulation of the electric utility industry are against the character of competition and wasteful duplication which result from the invasion of one utility's service area by another utility.

¹Appendix 15a.

It was made clear in the Congressional Hearings giving rise to the Federal Power Act—and specifically in testimony during those Hearings by the then Solicitor for the Commission, who was one of the authors of the Act—that the Act was “not drawn upon the theory that competition shall be established in the industry” and that, “There is nothing in this bill * * * that provides for competition.”¹

Protection of service areas, and avoidance of duplication of facilities through the invasion of one utility’s area by another utility, are also the clear policies of the Kentucky utility Statutes,² the Rules and policies of the Kentucky Commission³ and decisions of Kentucky’s highest Appellate Court.⁴

KU already has within the City of Paris both 69 KV and 33 KV transmission lines more than adequate to supply all of Paris’ needs with dependable service. In addition, KU has distribution facilities serving one-fourth of the customers within the City and a large number of customers in the area immediately surrounding the City. It would be contrary to the public interest for East Ky to be permitted to invade such clear service area of KU and to serve Paris, when KU can do so from already-established facilities.

¹Hearings on H. R. 5423 before Committee on Interstate and Foreign Commerce, House of Representatives, 74th Cong., 1st Sess. pp. 554-558.

²Kentucky Revised Statutes, §§ 278.020 *et seq.*

³Kentucky Commission Rule PSC:Proc-1 - VIII-2b.

⁴*City of Cold Spring v. Campbell County Water District*, 334 S. W. 2d 269 (Ky. 1960).

**The Policy and the Express Order of the Kentucky
Commission.**

It has just been noted that, by its Rules,¹ the Kentucky Commission has adopted a policy of avoiding the duplication of facilities which would result from the entry of one utility into the service area of another. In addition to such general Rule, however, the Kentucky Commission has entered an Order expressly directed to the present situation.

The newer of East Ky's two generating plants is its Burnside plant. As required by *Kentucky Revised Statutes §§ 278.010 and 278.020*, East Ky applied to the Kentucky Commission for a certificate of convenience and necessity authorizing construction of the Burnside plant. In its application for the certificate, and again in an amended application, East Ky represented to the Kentucky Commission that the capacity of the proposed new generating station was needed to supply the loads of East Ky's member cooperatives and that, if authorized, the new facility would not be used in competition with any other utility.² Similar representations were made in applications filed by East Ky before the Kentucky Commission seeking certificates authorizing the construction of East Ky's other generating and transmission facilities. In the Burnside matter, after extensive hearings the Kentucky Commission granted East Ky a certificate to construct the plant but, in its Order granting the certificate, the Kentucky Commission announced its policy that

¹Kentucky Commission Rule PSC:Proc-1 - VIII-2b.

²Exhibits 4 and 5; R. 780, 784.

"East Ky will not furnish nor deliver electric service directly or through its Members to any incorporated municipality not now receiving REA service and will so limit the use of power it supplies its Members in its power contracts with them."¹

The entry of an order by the Federal Commission which would result in East Ky's supplying power to Paris would not be in the public interest, since such supply by East Ky would be contrary to (a) the representation of East Ky to the Kentucky Commission that the generating facilities, authorized by that Commission on the basis of such representation, would not be used in competition with any other utility, (b) the general Rule and policy of the Kentucky Commission to avoid duplication of facilities from invasion of one utility's service area by another utility and (c) the specific Order of the Kentucky Commission that East Ky not furnish electric service, either directly or through its member coops, to any incorporated municipality not already receiving REA service.

There unquestionably are matters in the regulation of electric utilities with respect to which the line of demarcation between jurisdiction of the Federal Commission and that of the State Commissions is not clear. It is clear, however, that the Federal Commission does not have statutory authority to issue certificates authorizing the construction of steam generating plants; nor does it have authority to determine and enforce service

¹Exhibit 7, R. 792.

area boundaries of utilities. In *Alabama Electric Cooperative, Inc. v. Alabama Power Company*, FPC Docket No. E-7183, the FPC Examiner stated:

"This Commission has no authority to issue certificates of its own, or to modify those issued by a state agency. No attempt to affect the Alabama Commission's certificates should be undertaken where there is not merely grave doubt as to this Commission's jurisdiction to act but where, even assuming jurisdiction exists, sound policy considerations indicate that no relief should be granted."

It is the belief of KU that any question as to which of two competing utilities is entitled to serve a particular customer is for determination by the State regulatory agency having jurisdiction. In this case, however, no jurisdictional issue need be resolved. The clearly announced policies of both the Federal and Kentucky legislative bodies and regulatory agencies are in complete accord.

The Examiner covered the subject succinctly but thoroughly with his statements, first, that, even if FPC's jurisdiction in the matter was exclusive,

"This does not mean, however, that the Commission would not give appropriate consideration to the views of the Kentucky Commission; representations made to it in certificate applications on which it relied; and the policy created and followed by the Kentucky Commission."

And, second, that

"This is particularly true where the Kentucky Commission's action and policy do not stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress."¹

**The Policy of Congress Concerning Activities and Service
by REA-Financed Cooperatives.**

Congress did not establish the REA cooperatives, and subsidize them with the 2% money and income tax exemption, for the purpose of engaging in ruinous competition with the tax-paying investor-owned utilities. Specifically with respect to urban areas such as Paris, the very statutory lending authority of the Administrator of REA is restricted against the making of loans to finance facilities to serve municipalities with populations in excess of 1,500.² An order of the Commission permitting East Ky to serve Paris would have been contrary to these established policies of Congress. At a number of points in his Decision, the Examiner noted these considerations.³

The Matter of Cooperation among Utilities.

With increasing emphasis in the last few years, members of the Federal Power Commission and others have urged the investor-owned utilities to interconnect and engage in cooperative undertakings with the

¹Appendix 20a-21a, n. 19.

²7 U. S. C. §§ 904, 913.

³E. g., Appendix 2a n. 2, 16a, 22a, 23a.

generally smaller REA-financed coops, in order that the coops may share in and enjoy the efficiencies, savings and other benefits to be derived from advances in the technology of the industry. KU has done this.

As noted in petitioner's Brief, the transmission systems of KU and East Ky are interconnected at a number of points. This has been true since East Ky's system was first placed in operation in 1954; and the result has been avoidance of wasteful duplication of facilities and substantial savings achieved by both parties. In 1963, KU and East Ky added substantial areas of coordination and cooperation with respect to generating capacities.

If the transmission facilities of KU and East Ky were not interconnected, it would not be physically possible for KU to wheel power between Paris and East Ky. Thus, the coordination and cooperation to which KU has voluntarily agreed is sought to be turned into the very instrumentality for taking from KU, and giving to East Ky, a customer which KU can better serve and is rightfully entitled to serve by every established concept of sound utility law.

As KU's position was phrased by the Examiner, an order compelling KU to wheel power from East Ky to Paris would simply be an order that KU "wheel itself out of the power business in its Paris service area."¹ The Examiner stated his own view of Paris' request in the following terms:²

¹Appendix 3a.

²Appendix 23a.

"If * * * public utilities can be required in the circumstances of this case to wheel power for cooperatives, such a requirement might be found not to be to the mutual advantage of the parties and to be tantamount to requiring public utilities to help dig their own graves in certain areas."

Any order compelling KU to use its transmission facilities, voluntarily interconnected with those of East Ky, for the purpose of wheeling power between East Ky and Paris unquestionably would discourage the type of coordination and cooperation among utilities which is being urged upon the investor-owned segment of the industry, and thus would not be in the public interest.

The Examiner effectively summed up all of the "public interest" considerations with respect to the character of wheeling order which Paris sought from the Commission, as follows:¹

"It would not be in the total public interest. It is not a part of KU's expected duty as a public utility."

* * *

In this proceeding, two wholly irreconcilable courses of action were urged upon the Commission. Paris asked that its contract with East Ky, which provided for the exchange and purchase of power at specified rates, be accepted for filing and approved, and that KU be ordered to transmit to Paris the energy to be so purchased by it from East Ky. In direct opposition,

¹Appendix 22a.

KU asserted that it was entitled to supply whatever power Paris needs and desires and that it was not necessary or appropriate in the public interest for the Commission to direct the action requested by Paris, even if the Commission had authority to do so.

With the case in this posture, the Commission made its Finding that

"The establishment of a physical connection between the transmission facilities of KU and Paris and the sale of energy to Paris is necessary and appropriate in the public interest * * *."

Such Finding necessarily reflects a conclusion by the Commission that the totally inconsistent action requested by Paris is *not* necessary or appropriate in the public interest. That this is the intent and necessary effect of the Commission's Finding is demonstrated by Findings 8 and 11 of the Examiner, which Findings respectively are as follows:¹

- "(8) An interconnection between the KU and Paris systems for the purpose of selling and exchanging energy and coordinating their requirements is necessary and appropriate in the public interest."
- "(11) It would not be in the public interest or the interest of the electric consumers of Paris during the next few years for the Commission to enter an order which would have the effect of permitting East Ky to furnish power to Paris, *even if the Commission had jurisdiction over the East Ky-Paris agreement*, whereas it would be in the public in-

¹Appendix 26a.

terest for the Commission to permit or require KU to sell energy to and exchange energy with Paris under the terms and provisions of an arrangement agreed upon between Paris and KU, if acceptable to the Commission, or fixed by the Commission after further hearing."

Since the positions of the parties were in such direct conflict, the Commission apparently saw no reason to state its Finding twice: once in the affirmative, that KU sell the energy to Paris; a second time in the negative, that East Ky not.

There can be no question, however, that, in its Opinion, Findings and Order, the Commission adopted the Findings and recommendations of the Examiner. In fact, the Commission was more definitive and conclusive than the Examiner in ordering that KU sell the energy to Paris. The Examiner recommended that, if KU and Paris could not agree upon the terms and conditions upon which KU would sell energy to and exchange energy with Paris, the Commission hold further hearings and establish such terms and conditions. The Commission, stating that "The record is adequate in all respects," concluded that no hearings were necessary, and ordered that KU "sell and supply energy to Paris *under the rate schedule, as supplemented, offered to Paris* and entered in the record as Annex A and Annex B to the Paris complaint and as Exhibit No. 2 of Kentucky Utilities Company."

Once the Commission had concluded that it has no jurisdiction or statutory authority to grant either of

the two requests made by Paris, the Commission did not have to do anything further. It could have simply dismissed Paris' Complaint. But the Commission did not do this. Instead, it made a Finding that it is necessary and appropriate in the public interest that KU sell to Paris the energy it needs, and then ordered KU to interconnect with Paris and thereafter sell and supply energy to Paris.

As observed by the Commission, the entry by it of an order under § 202(b) of the Act is "dependent" upon a finding that the ordered action is necessary or appropriate in the public interest. Not only did the Commission *not* find that the action requested by Paris was necessary or appropriate in the public interest, the Commission did make the totally inconsistent finding that the supply of power by KU to Paris *is* necessary and appropriate in the public interest.

The Commission also significantly observed that its Order would "serve the objectives of Part II of the Federal Power Act."¹ If KU's supplying the energy needs of Paris "serves the objectives of Part II of the Act," it must necessarily follow that an order compelling KU to wheel energy from East Ky to Paris, to enable East Ky to supply those needs, would not serve such objectives.

The Commission's Finding, that it is necessary and appropriate in the public interest that KU supply the energy needs of Paris, is correct and is not challenged by petitioner in this Court. Such Finding is an additional ground upon which the Commission's Order pursuant thereto should be affirmed.

¹Petitioner's Appendix 4a.

II.

The Commission Is Not Empowered by the Act to Compel an Investor-owned Utility, Over Its Objection, to Transmit or Wheel Power for Another Utility, Whether Such Other Utility Is Another Private Utility or a Municipality or Other Government Agency or Instrumentality.

It of course is fundamental that the Commission has only those powers conferred upon it by the Act.

Two Sections of the Act are pertinent to a consideration of the extent to which the Commission can act, and the nature of action it may take, to seek to bring about the transmission by one utility of energy of and for the benefit of another utility.

Pertinent provisions of § 202(a) of the Act are as follows:¹

"For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the *voluntary* interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty

¹Petitioner's Appendix 8a.

of the Commission to *promote* and *encourage* such interconnection and coordination within each such district and between such districts. * * *

It is immediately apparent that, under § 202(a), the Commission has no power or authority to *compel* any action of any kind by a utility. The Commission may designate districts; but such districts are for only "the *voluntary* interconnection and coordination" of generation and transmission facilities. Having designated such districts, the Commission may "*promote* and *encourage* such [*i.e.*, *voluntary*] interconnection and coordination."

All parties in the present case recognize that, under § 202(a), the Commission cannot compel action of any kind—much less compel one utility to wheel power from a competing utility (East Ky) to a customer (Paris) which the wheeling utility claims the right to serve. The significance of consideration of § 202(a) is that it is the *only* Section of the Act dealing at all with the type of facility coordination involved in one utility's wheeling power for another. And § 202(a) makes it plain that such coordination of facilities is to be—and properly so—only on a voluntary basis.

It is § 202(b) of the Act which does confer upon the Commission the authority to compel certain acts. It is § 202(b) of the Act under which Paris sought an order by the Commission to require KU to wheel energy between East Ky and Paris.

In sharp contrast to the broad, undefined "coordination of facilities" which the Commission may promote and encourage on a *voluntary* basis under § 202-

(a), the acts which the Commission may *compel* under § 202(b) are few and are clearly defined. The pertinent provisions of § 202(b) are as follows:¹

“Whenever the Commission, upon application * * * and after notice * * * and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility * * * to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, *to sell energy to or exchange energy with such persons* * * *.”

Thus, where the prerequisites of proper application, etc. (including a finding by the Commission that such action is necessary or appropriate in the public interest) are met, the Commission may compel a public utility to interconnect its transmission facilities with those of a person engaged in the transmission or sale of energy. But the only purpose for which such interconnection may be compelled—and the only further action which may be required of the interconnecting utility—is “*to sell energy to or exchange energy with*” such person. There is no authority whatever in the Commission to compel an interconnection for the purpose of, or in any manner to compel, wheeling by one utility, over its transmission facilities, of energy between and for the benefit of other utilities or other persons.

It is immaterial to this conclusion whether the other utilities or other persons are other private utilities or

¹Petitioner's Appendix 9a.

are municipalities or other government agencies or instrumentalities. The authority to compel wheeling simply is not conferred with respect to any of them.

The absence from the Act of authority in the Commission to compel wheeling, or transmission of power for others, is intentional on the part of Congress.

In both original bills (S. 1725 and H. R. 5423; 74th Cong., 1st Sess.) which, with amendments, developed into the Federal Power Act, it was expressly made the duty of a public utility to transmit energy for any other person upon reasonable request therefor, and the Commission was expressly authorized to require a public utility to transmit energy for, or to permit the use of its facilities for such purpose by, one or more other persons. Thus, §§ 202(a) and 203(b) [the amended provisions of which were later renumbered to 202(b)] of the original bills were as follows:¹

¹The following summarizes the pertinent history of this legislation:

On February 6, 1935, S. 1725 was introduced in the United States Senate and a companion bill, H.R. 5423, was introduced in the House. Hearings were held on H.R. 5423 before the House Committee on Interstate and Foreign Commerce (herein referred to as the "House Hearings") from February 19 to April 15, 1935, and on S. 1725 before the Senate Committee on Interstate Commerce (hereafter "Senate Hearings") to April 29, 1935. Thereafter, the Senate Committee drafted, in lieu of S. 1725, a substitute bill, S. 2796 (S. Rep. No. 621, 74th Cong., 1st Sess.) which was passed by the Senate. The House Committee proposed certain amendments—not here pertinent—to S. 2796, as passed by the Senate (H.R. Rep. No. 1318, 74th Cong., 1st Session.), and this version was passed by the House. The Conference Committee agreed upon S. 2796 as so amended by the House (Conference Report, H.R. Rep. No. 1903, 74th Cong., 1st Sess.) which was passed

(Footnote continued on following page)

"Sec. 202(a) It shall be the duty of every public utility to furnish energy to, exchange energy with, and transmit energy for any person upon reasonable request therefor, * * *."

"Sec. 203(b) Whenever the Commission after notice and opportunity for hearing finds such action necessary or desirable in the public interest, it may by order direct a public utility to make additions, extensions, repairs, or improvements to or change in its facilities, to establish physical connection with the facilities of one or more other persons, to permit the use of its facilities by one or more persons, or to utilize the facilities of, sell energy to, purchase energy from, transmit energy for, or exchange energy with, one or more other persons. * * *" (House Hearings, at 32; Senate Hearings, at 40)

However, the provisions italicized above, and the powers thereby granted, were excluded from the Act finally passed. The powers so eliminated and denied of course are the precise powers which Paris sought to have the Commission exercise in this proceeding.

Following completion of committee hearings on the original bills, the Senate Committee drafted an entire substitute bill, S. 2796, for the reason that the Committee had "so extensively amended S. 1725 that the

by Congress and on August 26, 1935, was signed by the President (49 Stat. 847).

Title II of S. 2796 amended certain sections of the Federal Water Power Act, called it Part I (49 Stat. 847, § 212); added two new parts: Part II containing the provisions for the regulation of electric energy in interstate commerce, and Part III containing administrative provisions applicable to Parts I and II (49 Stat. 847, § 213); and gave the whole the title "Federal Power Act" (49 Stat. 863, § 320).

Committee has thought it advisable to report a substitute bill."¹ In the substitute bill, which the Senate passed, § 202(a) of S. 1725, which *inter alia* would have made it the duty of every public utility to "transmit energy for any person upon reasonable request therefor," was rejected in its entirety, and § 203(b) of S. 1725 was renumbered 202(b) and changed to read as follows:

"202(b) Upon complaint by any State commission or public utility, the Commission after notice and opportunity for hearing and after a finding that such action is necessary or appropriate in the public interest may by order direct a public utility subject to the provisions of this Act to establish physical connection with the facilities of any other public utility or to sell energy to or exchange energy with any such public utility." (S. 2796.)

Those provisions of old § 203(b) which would have empowered the Commission to require a public utility "to permit the use of its facilities by one or more other persons" or to "transmit energy for * * * one or more other persons" were completely eliminated.

The Report of the Senate Committee made it clear that the exclusion of those powers, as well as the elimination of § 202(a), were made with the definite intention of leaving to the voluntary action of the utilities the matters excluded. That Report stated (at p. 19):

"Section 202(a) of S. 1725 imposed upon each public utility the duty to furnish energy to, exchange energy with and transmit energy for any

¹S. Rep. No. 621 on S. 2796, 74th Cong., 1st Sess. (1935).

person upon reasonable request. This provision has been eliminated, * * *. While imposition of these duties may ultimately be found to be desirable, the committee does not think that they should be included in this first exercise of Federal power over electric companies. It relies upon the provision for the voluntary coordination of electric facilities in regional districts contained in the new section 202(a), (formerly sec. 203(a)), for the first Federal effort in this direction. * * * Furthermore, the provisions of the old section 203(b) empowering the Federal Power Commission to require one utility to permit the use of its facilities by another, or to make extensions or improvements have been eliminated; these matters are left to the voluntary action of the utilities."

Section 202(b) of S. 2796 was amended by the House but in respects not affecting the issues here involved. The Section as so amended was agreed to by the Conference Committee, was passed by the Congress, and is now § 202(b) of the Federal Power Act. This Section as finally enacted empowers the Commission, subject to the conditions therein stated, "to direct a public utility * * * to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons." The power of the Commission to direct a public utility "to permit the use of its facilities by one or more other persons or to transmit energy for one or more other persons" contained in § 203(b) of the original bills (S. 1725 and H. R. 5432) was eliminated and denied.

It is well settled that powers legislatively proposed but rejected, and excluded from an Act as finally adopted, are excluded from the powers granted by the Act. *Federal Trade Commission v. Borden Co.*, 383 U. S. 637, 641-644 (1966); *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195, 205-211 (1962); *United States v. Witkovich*, 353 U. S. 194, 200-201 (1957); *United States v. Universal Corporation*, 344 U. S. 218, 223 (1952); *United States v. Great Northern Railway Co.*, 343 U. S. 562, 575 (1952); *Fox v. Standard Oil Co.*, 294 U. S. 87, 96 (1935); *Carey v. Donohue*, 240 U. S. 430, 436-437 (1916).

Thus, the Act does not empower the Commission to require KU to transmit energy for, or to permit the use of its facilities for that purpose by, Paris or East Ky or anyone else, whether a utility company, a municipality or other government instrumentality.

The Commission correctly concluded that it has no authority to "compel a private utility to transmit the power of government instrumentalities under Part II of the FPA"—both Paris and East Ky being government instrumentalities within the meaning of such statement. Having so correctly concluded that it does not have statutory authority to compel KU to wheel on the facts of this case, the Commission preferred not to go beyond such facts to here decide the broader question of whether it could compel any transmission of power "for the benefit of third parties."

The Examiner did not so limit his holdings. Thus, he correctly stated:¹

¹Appendix 17a-18a.

"The power to require a public utility such as KU to transmit energy for others, or to permit the use of its facilities by others, is not included in the powers of the Commission enumerated in Section 202(b) of the Act which are to—

'direct a public utility * * to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons * *.'"

As observed above, the Examiner also pointed out that the character of coordination involved in wheeling power for others was left to *voluntary* action of the utilities, in the following language:¹

"Further, the authority to direct a public utility to wheel power was initially requested of Congress in the original bills (S. 1725 and H. R. 5423). This authority, however, was rejected in all amendments by Congressional committees and by Congress in the Act as finally adopted. Thus the matter of wheeling power was left to the voluntary action of public utilities."

There is nothing in the Commission's Tentative Opinion of December 5, 1966, in *Crisp County Power Comm'n v. Georgia Power Co.*, FPC Docket No. E-7120, even faintly suggesting a contrary conclusion—although petitioner in its Brief (p. 32) would so imply. The case did not involve, and the Commission in its Opinion was in no way concerned with, compulsory wheeling. The same is true of *Buckeye Power, Inc.*

¹Appendix 18a.

and Ohio Power Co., FPC Docket No. E-7355, also cited by petitioner; compulsory wheeling simply was not involved.

In the more than 30 years of active regulation under the Act, the Commission has never once undertaken to exercise, or indicated a belief that it had, statutory authority under Part II of the Act to require a utility to wheel power for others. Under this Court's February 15, 1968 Opinion in the *Salt River* case,¹ such a "continuous 30-year administrative practice of non-regulation * * * and the congressional response to this practice" are significant considerations.

III

The Commission Is Not Empowered by the Act to Compel an Investor-owned Utility, Over Its Objection, to Wheel Power between, and for the Benefit of, a Municipally-owned System and an REA Cooperative.

Both the express provisions and the legislative history of the Act make it clear that the Commission has no authority under the Act to require a private utility to wheel power for others. If the Court agrees, there of course is no need to consider separately whether the Commission has statutory authority to compel a private utility to wheel power from a municipally-owned generating plant to an REA-financed coop, and from an REA-financed generating plant to a distribution system owned by the municipality. We treat the nar-

¹*Salt River, etc., Power District v. FPC*, No. 20,960, Official Printing of February 15, 1968 Opinion, p. 8.

rower question separately in this instance only because the Commission preferred to limit its decision to those precise facts presented in this case.

As emphasized in petitioner's Brief¹ and in the Commission's Opinion,² Paris made *two* requests of the Commission. First, Paris sought an order of the Commission filing and approving Paris' agreement with East Ky. Second, it sought an order compelling KU to interconnect with Paris and thereafter wheel between Paris and East Ky the energy to be purchased and exchanged between them under their agreement.

The Commission's entire Opinion is brief, containing, exclusive of the formal Findings and Order, only fifteen paragraphs. The first eight paragraphs contain a statement of the facts and issues. The tenth through thirteenth paragraphs contain the Commission's discussion pertinent to its conclusion that it is necessary and appropriate in the public interest for KU to interconnect its transmission facilities to the Paris system and to sell energy to Paris. The final two paragraphs in the Opinion are concerned with an interlocutory motion for a temporary interconnection between Paris and KU, which motion had become moot even by the time of the Commission's Opinion.

The Commission disposed of Paris' two requests to the Commission—(1) that the Commission file and approve Paris' agreement with East Ky and (2) that the Commission order KU to interconnect with Paris

¹Pages 3, 28-29.

²Petitioner's Appendix 3a.

and wheel energy between Paris and East Ky—in the single ninth paragraph in its Opinion, as follows:¹

“We hold that the Commission may not grant either of Paris’ requests. The Commission has no jurisdiction over the activities of municipalities,² or over REA-financed cooperatives which we have held to be a government ‘instrumentality’ under section 201(f) of the FPA.³ This Commission does not have to decide whether it can order under section 202(b) a public utility to transmit power for the benefit of third parties since it is clear that the Commission cannot compel a private utility to transmit the power of government instrumentalities under Part II of the FPA.⁴ In view of the foregoing it is not necessary to consider the correctness of Staff’s characterization of the proposed arrangement.”

¹Section 201(f).

²[Citing the Commission’s Opinions in the *Dairyland* and *Salt River* cases.]

³[Citing pertinent legislative history hereafter cited in this Brief, and the Supreme Court’s decision in *United States v. P.U.C.*, 345 U. S. 295 at p. 313, footnote 28.]”

As a basis for its rejection of both of Paris’ two requests, the Commission thus noted its lack of jurisdiction over the activities of municipalities such as Paris, or over REA-financed coops such as East Ky. It is interesting—but not significant to the ultimate conclusion of lack of Commission jurisdiction over the coops—that, in observing such lack of jurisdiction, the Commission mentioned only its conclusion in *Dairyland* that the coops are government instrumentalities under § 201(f) of the Act. In *Dairyland*, the Commission

¹Petitioner’s Appendix 3a.

also concluded "that cooperatives financed by REA are not public utilities within the meaning of Part II of the Federal Power Act"; and, again, stated its finding "that the cooperatives are not public utilities under the Federal Power Act, for any purposes."

In its February 15, 1968 Opinion in *Salt River*, this Court affirmed the Commission's conclusion that it does not have jurisdiction over REA-financed coops, upon the threshold ground that such coops are not public utilities within the meaning of Parts II and III of the Act. Having thus determined that the coops are not public utilities subject to the Act in the first instance, the Court obviously found it unnecessary to consider whether the coops are in some manner exempt under the provisions of § 201(f) of the Act.

In any event, this Court's affirmance of the Commission's *Salt River* decision, upon the broader ground that coops are not public utilities under the Act, obviously requires an affirmance of the Commission's re-statement, in its Opinion in the present case, of its lack of jurisdiction over REA-financed coops, even though, in the present Opinion, the Commission mentioned only one of the two grounds upon which it had earlier concluded that it had no such jurisdiction.

In addition to the technical legal, there are also very practical, results flowing from this lack of Commission jurisdiction over both Paris and East Ky; and all of these considerations bear significantly upon the conclusion that it is in the public interest for KU, rather than East Ky, to sell and supply the energy needs of

Paris. Some of these considerations are discussed in the Examiner's Decision, although the Commission, once having cited its lack of such jurisdiction, did not take time to note them.

If the Commission could and did compel KU to interconnect with Paris and thereafter wheel energy between Paris and East Ky, of the three parties to such arrangement, KU would be the only one whose activities would be in any respect subject to Commission jurisdiction and regulation. The Commission could not compel either Paris or East Ky to take any action of any kind pertinent in any manner to the arrangement.

From the standpoint of Paris, East Ky service to Paris would be entirely unregulated service. The Federal Commission would have no control over the rates or conditions of service; and the Kentucky Commission similarly would have no control over the terms of such wholesale sale to Paris.

The establishment of such unregulated service in a highly competitive situation such as would be here created would also be contrary to the public interest and to the legitimate interest of KU. Completely without regulation or control, East Ky could establish, and at will change, a discriminatorily-low rate to Paris—perhaps even a non-compensatory rate—in order to undersell KU in this competitive situation, the other rate payers of East Ky being required to make up the deficit. Regulated as it is by the Commission, KU would be at a decided disadvantage in such competitive struggle with unregulated, uncontrolled service.

It certainly would not be in the total public interest for the Commission to foster such character of cut-throat and destructive competition between these two different segments of the industry.

Specifically with respect to Paris' second request—that the Commission order KU to wheel energy between Paris and East Ky—the Commission stated:

"This Commission does not have to decide whether it can order under section 202(b) a public utility to transmit power for the benefit of third parties since it is clear that the Commission cannot compel a private utility to transmit the power of government instrumentalities under Part II of the FPA."³

"³[Citing pertinent legislative history.]"

It is clear that, in using the term "government instrumentalities" in such statement, the Commission was *not* using the term in any technical or limited sense as it might be argued to have been used in § 201(f) of the Act. First, in this statement dealing specifically with its lack of authority to compel KU to wheel under the facts of this case, the Commission made no reference to § 201(f).

Perhaps more significant is the fact that neither Chairman White nor Commissioner Bagge took any exception to the statement just quoted, that "the Commission cannot compel a private utility to transmit the power of government instrumentalities under Part II of the FPA." If "government instrumentalities" were intended to be accorded the same meaning in such

statement as it has in § 201(f), Chairman White and Commissioner Bagge might well have taken exception to the statement, at least as it related to East Ky. In their separate Opinions in *Dairyland*, each of them expressly concluded that the coops are not "government instrumentalities" under § 201(f).

One final circumstance, however, demonstrates conclusively that, in emphasizing that it does not have authority to compel a private utility to transmit the power of "government instrumentalities," the Commission was not using the term "government instrumentalities" in any technical or limited sense in which it may be argued to have been used in § 201(f). Such consideration is the Commission's reference to pertinent discussions in the legislative history of the Power Act. If there is one thing clearer than all others in the legislative history of this Act, it is that Congress wanted to be absolutely certain that the private utilities of the Country could not be compelled by the Commission to transmit or wheel energy for any type of government or public power entity, giving those terms their broadest application.

In reading the legislative history next to be set out, the Court will note that, in emphasizing their purpose that private utilities not be compelled to wheel power generated by any type of government project, some of the Congressmen distinguished between compulsory wheeling for other private utilities and compulsory wheeling for government instrumentalities, their statements indicating Commission authority to compel one private utility to wheel for another private utility, but

not for any type of government project. This is because the bill under discussion in these hearings was H. R. 5423 which, as discussed above, would have authorized the Commission to order a private utility "to permit the use of its facilities by one or more other persons, or to * * * transmit energy for * * * one or more other persons." Thus, at the time Congress was considering giving to the Commission authority to compel one private utility to transmit energy for another, it wanted to make doubly certain that, even with that power, the Commission would *not* have authority to compel a private utility to transmit energy for any type of government or public project. Even the authority to compel wheeling for another privately-owned utility of course was excluded from the Act as passed, and the Commission does not now have that authority.

The pertinent parts of the legislative history developed during the House Hearings on H. R. 5423 are as follows:

TESTIMONY OF COMMISSIONER SEAVEY.¹

"Mr. Pettengill: Do you know whether it is planned to use the private power lines of the United States to carry the electric energy generated at the Tennessee Valley power plants?

"Commissioner Seavey. No; this act does not go to that extent."

* * *

"Mr. Pettengill. Would it require any further authorization than that that is in this bill?

¹FPC Commissioner Clyde L. Seavey who, together with Mr. DeVane, drafted Part II of the Act.

"Commissioner Seavey. Yes; it would require an additional provision in this act, if that were to be done.

"Mr. Pettengill. Why is that? * * *

"Commissioner Seavey. Well, the person that has that privilege under this bill is a person defined as an individual and a corporation would not come under it; *it would not include a municipality or a Government power development*, or the Tennessee Valley Authority.

"Mr. Pettengill. Therefore, is it your judgment then that *no Government generating plant* could require the use of private power lines to carry their electric energy under the terms of this bill as written?

"Commissioner Seavey. Yes, that is my opinion, except through the provisions where voluntary agreements may be entered into at which time those voluntary agreements would be supervised by the Federal Power Commission." (House Hearings, p. 395.)

* * *

"Mr. Pettengill. Mr. Commissioner, you just said a moment ago that as you construed the bill, a private power line could not be required to carry electric energy generated by the Tennessee Valley Authority or a municipal plant owned by a city, or a State; is that correct?

"Commissioner Seavey. Yes; that is my understanding of the bill." (House Hearings, p. 397.)

TESTIMONY OF SOLICITOR DeVANE.¹

"Mr. Wolverton. Under the provisions of this bill, would it be possible for the Government *in any of its electric operations* to utilize the transmission lines of private companies?

"Mr. DeVane. No, sir; and I want to make that very definite; and if there is any doubt about it, so far as I am concerned, such amendment might be made as to make it clear. * * * We have, *insofar as State, municipal or Government projects are concerned*, excluded them from the jurisdiction of the Commission or from coming under this act. We have been earnest and honest in our effort to accomplish this result. We think we have done it. * * * If * * * it is the desire of Congress *not to * * * give the municipal or governmental projects the right to use the transmission lines of private industry*—and we have not succeeded in making that clear in this bill—an amendment should be proposed that will do it better. It will receive our hearty endorsement. * * *

"Mr. Wolverton. Let me suggest a possible situation. Your answer will clarify my mind considerably as to the effect of this bill in the particular instance: Assume that a *municipality* built a plant for the generation and distribution of electric energy. Assume that a distant community is serviced by a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State. Could the city which has constructed a plant, but has no *transmission lines*, utilize the system of transmission lines constructed by the private company?

¹FPC Solicitor Dozier A. DeVane.

"Mr. DeVane. No, sir. * * * *" (House Hearings, p. 514.)

* * * *

"Mr. Wolverton. Then, you do not think that the power given in this bill to the Federal Power Commission would enable it to direct that those transmission lines be so used?

"Mr. DeVane. Mr. Wolverton, my answer to that is this, 'that if there is any doubt about it and this committee can remove that doubt by additional words in this bill, let's put them in.'" (House Hearings, p. 515.)

* * * *

"Mr. Mapes. Is it the purpose to compel the privately owned transmission companies *to carry the energy of municipal projects* as well as private projects?

"Mr. DeVane. No, sir; I thought I had made that very clear. If I did not, I want to make it very clear now. It is not intended to give the Commission power to require the private lines to take on any power generated *by municipal plants or by Government plant.*

"Now, that is a policy for Congress to determine; but so far as the Federal Power Commission is concerned, it is not asking or seeking that authority, and this bill does not propose to give the Commission any jurisdiction over that kind of a case.

"Mr. Mapes. The Commission does not propose it; and in your opinion the bill does not allow it?

"Mr. DeVane. The bill does not * * *."
 (House Hearings, p. 546.)

* * * * *
 "Mr. DeVane. * * * The only thing that we [the witness and the Commission] have discussed is the desirability of making it perfectly clear in this law that it is not the intention of this law to reach out and get control of that power nor is it the intention of this law to authorize the Commission to require the transmission of that power on the lines of these private operating companies."
 (House Hearings, p. 559.)

Similar testimony was given during Hearings before the Senate.¹

Thus, it is clear that the Commission was not seeking, and that Congress had no intention of conferring upon the Commission, authority to compel a private utility to transmit energy from a municipal or any other type of government or public power project—much less compel a private utility to transmit energy between two such projects, one of which is in practical effect a customer or consumer which the private utility claims the right to serve.

There of course is no question that the Paris generating plant is a municipally or publicly-owned plant. In addition to the foregoing legislative history establishing that KU cannot be compelled to wheel energy from such plant, there of course cannot be any question of the further fact that Paris is a "political sub-

¹See Hearings, Senate Committee on Interstate Commerce on S. 1725, 74th Congress, 1st Session, e.g., p. 256.

division of a State," and that the Paris plant is an "instrumentality of" such political subdivision, and therefore expressly exempt from provisions of the Act under § 201(f), if Paris' exemption under that Section is deemed material.

It has been stressed by Paris throughout this case, as significant to its entire position in the case, that its agreement with East Ky is, as it is entitled, an "Interchange Agreement," rather than merely a contract for the sale of power by East Ky to Paris. On the first page of its Brief before this Court, Paris states that it "was seeking the use of this interconnection [to KU] to facilitate a *power exchange* agreement with East Ky." Again on page 5, Paris says that it wanted the interconnection "for *power exchange* with East Ky." On page 6, it again describes the purpose of interconnection as one "to facilitate *exchanges of power* between East Ky and Paris." On Page 28, the interconnection is described as one "for *interchanges between Paris and East Ky*."

Thus it has been Paris' position throughout the proceeding, and now remains Paris' position, that KU should be compelled, not only to transmit to Paris energy from the generating plants of East Ky, but to transmit to East Ky energy generated in the plant of Paris. Since it is clear beyond discussion that the Commission has no authority to compel KU to transmit over its lines energy generated in the plant of a municipally-owned system, the Commission obviously was without authority to grant the relief sought by Paris—whether East Ky is or is not considered to be

a public power system within the meaning of the legislative history just above discussed.

As the Commission recognized, however, it is also clear that, within the purpose of the statements above quoted from the history of the Act, East Ky is a government instrumentality or public power project such as the Commission representatives and the Congressmen had in mind, in seeking to insure that the private power companies not be compelled to transmit power from such projects. Within the purpose underlying these discussions, there is no significance to the bare fact of public ownership of one sort or another.

The significance in such ownership lies in the competitive advantages to which it gives rise. These of course are exemptions from various types of taxation, and financing by the taxpayers at greatly reduced interest rates or other money costs. Congress recognized that it would not be fair to compel the private utilities to transmit energy for the benefit of various kinds of public power projects which enjoy these tremendous competitive advantages over the private utilities.

East Ky and other REA-financed cooperatives have all of these competitive advantages and are in these respects precisely like other types of government instrumentalities and public power projects. East Ky pays no Federal or Kentucky Income Tax. KU pays both. East Ky's entire generating and transmission systems have been constructed with funds borrowed from the taxpayers of the Country, through REA, at the subsidized 2% interest rate. The private utilities

are currently experiencing financing costs of between 6% and 7%.

Every reason underlying Congress' decision not to subject the private utilities to compulsory wheeling of energy from and for the benefit of municipally-owned projects and other government instrumentalities and public power projects is present and dictates a conclusion that East Ky is such a government instrumentality or public power project.

* * *

Perhaps it need not again be mentioned that, after these discussions demonstrating Congress' particular determination that the private utilities not be compelled to wheel any type of government or public power, Congress completely eliminated from the Act, before passage, all provisions which would have authorized the Commission to compel the private utilities to engage in any kind of transmission or wheeling activity for any entity of any type—publicly-owned, governmental, or otherwise.

CONCLUSION.

It is respectfully submitted that the Commission reached a correct result in its Opinion and Order and that the Order should be affirmed.

Respectfully submitted,

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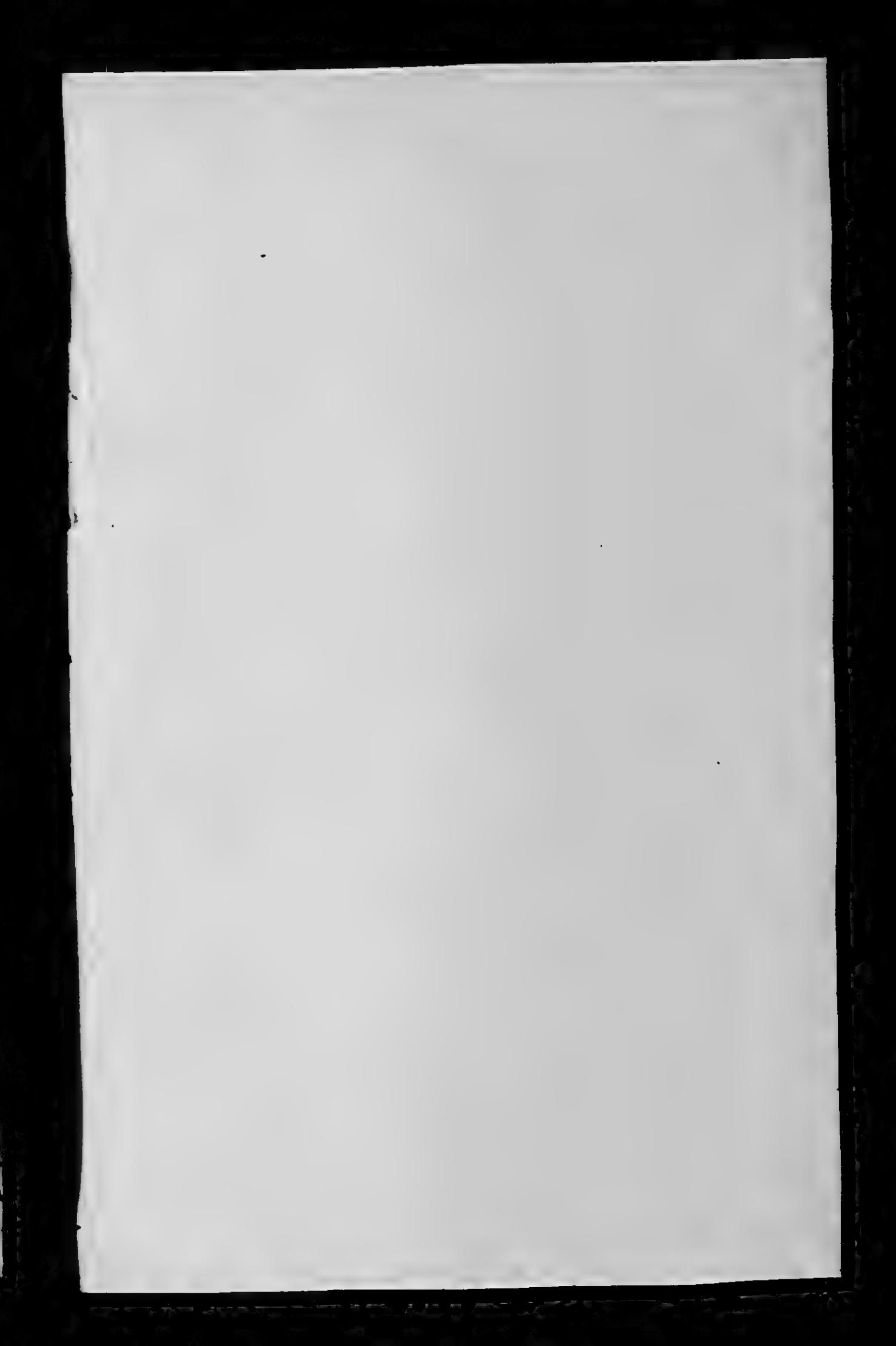
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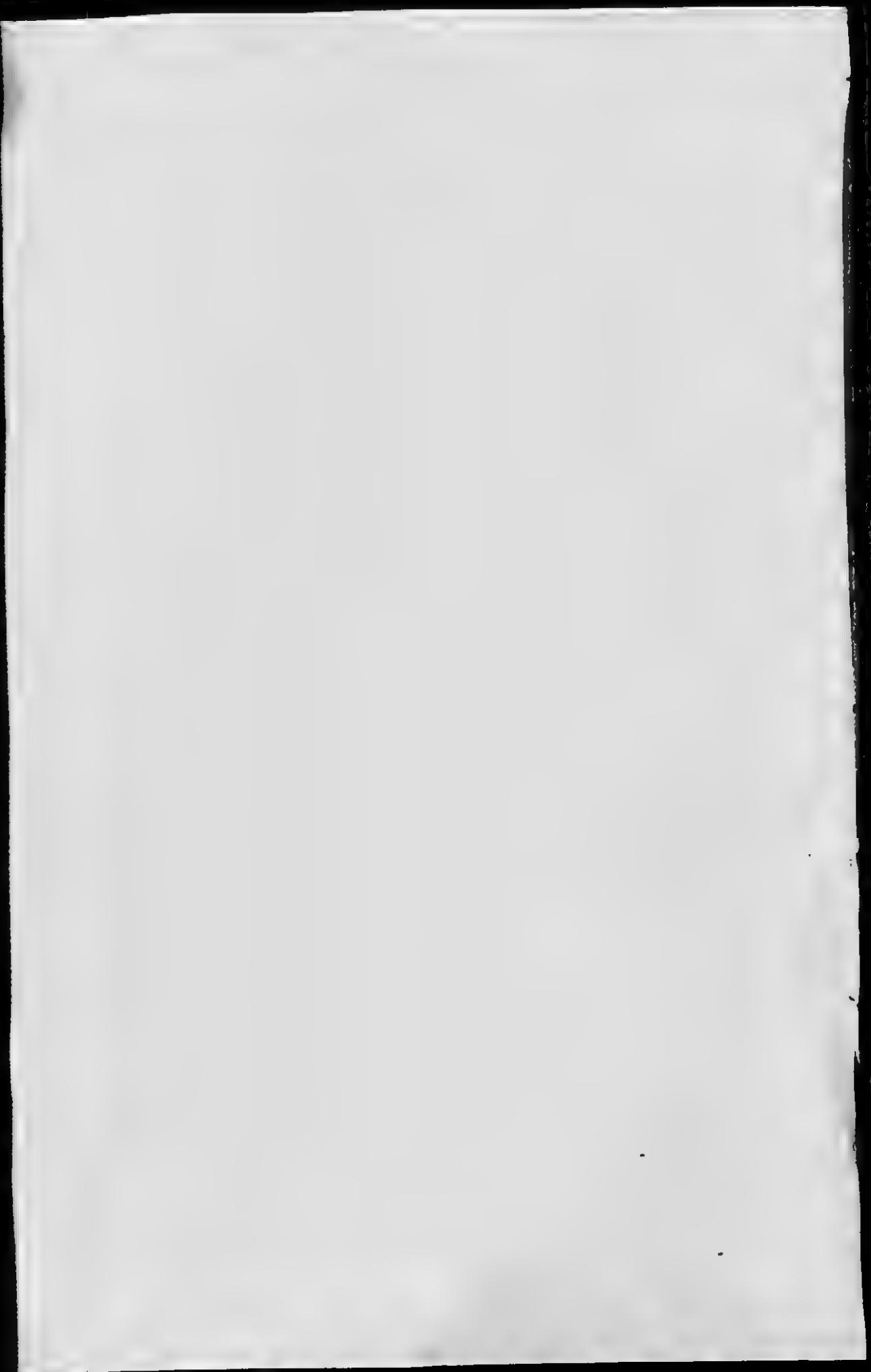
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March 11, 1968.



APPENDIX



UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

City of Paris, Kentucky, - Complainant }
v. } Docket
Kentucky Utilities Company, - Defendant } No. E-7249

PRESIDING EXAMINER'S INITIAL DECISION
UPON FORMAL COMPLAINT

(Issued February 2, 1967)

Hall, Presiding Examiner: The City of Paris, Kentucky (Paris) brought this action against Kentucky Utilities Company (KU) under Section 202(b) of Part II of the Federal Power Act (Act).¹ In essence, it is a request for an order by the Commission requiring KU to wheel (i.e., to transmit) for the benefit of Paris and East Kentucky Rural Electric Cooperative Corporation (East Ky), both competitors of KU, the power and energy proposed to be purchased and exchanged between them pursuant to their contract dated August 31, 1965, attached to the Complaint as Annex C. The Commission is asked by Paris, but not as

¹Section 202(b) authorizes the Commission, upon complaint, to order a public utility to interconnect its facilities with those of a person engaged in the sale or transmission of electric energy and to sell energy to or exchange energy with such person as the public interest may require. It also empowers the Commission to prescribe the terms and conditions of the arrangement directed by order. But neither Section 202(b) nor any other provision of Part II of the Act authorizes the Commission to require a private utility to act as common carrier of power generated in publicly owned plants. Where private utilities do so they do so voluntarily and to the mutual advantage of the parties involved.

yet by East Ky, to accept for filing and approve this contract which has not been shown to have been approved by the Administrator of the Rural Electrification Administration (REA), a condition made by the parties to the validity of the agreement.

The Commission has never asserted authority under Part II of the Act to compel a public utility to do what Paris is here requesting, namely, wheel power for a municipality or for both a municipality and a REA-financed cooperative.² It has in fact recognized, as has its counsel in

²REA was created by President Roosevelt on May 11, 1935, under authority of the Emergency Relief Act of that year. By passage of the Rural Electrification Act in 1936 Congress gave permanence to the agency and broadened its scope. That Act was designed to make it possible for low cost electric energy to be provided to rural America through cooperatives created under state law and needing low cost REA financing. The mission of the cooperatives was, in many states, greatly aided in 1936 and thereafter by new state legislation and new administrative rulings. The benefits provided by cooperatives to rural America would be hard to exaggerate.

In 1936 only about 11 percent of the country's farms were electrified. Now practically all of them are. In 1936 it was generally thought that, in addition to the REA Administrator's supervisory authority, consumer rates charged by cooperatives would be subject to regulation by state commissions, the service which they were to render being local in nature. Cooperatives, however, have not been held to their original purpose. Many now carry on operations in more than one state. In several instances, investor-owned companies operate generating plants owned by cooperatives.

REA cooperatives occupy a middle ground between private and public power, being owned by members but financed by federal loans supervised by the REA Administrator until liquidated. They pay only 2 percent interest money and are exempt from federal and most state and local taxation. Investor-owned power companies are greatly concerned about the fact that with these advantages REA-financed cooperatives have begun to compete effectively with them in former rural areas which are now urbanized, and in service to industrial, commercial and other nonfarm customers. Another factor which disturbs these companies is that many REA-financed cooperatives now carry on large-scale generating, transmission and distribution operations which, in many instances, are interstate in character.

Most cooperatives are REA-financed. Some are only partially financed by REA, one example being the construction of the 1,230,000-kw Cardinal plant jointly owned by Ohio Power Company and Buckeye Power, Inc., an association of thirty Ohio REA cooperatives, this undertaking apparently being the first of its kind in REA history. According to the Examiner's understanding, this plant is about to be put into operation and was constructed pursuant to an agreement providing that the cooperatives would borrow whatever they needed of their half of the plant's estimated \$125,000,000 cost from private sources, paying the same interest that an investor-owned utility must pay. The Ohio Power

(Footnote continued on following page.)

court proceedings, that Congress denied such authority to it (see *infra*, pp. 20-22 [17a-20a]).

KU, while opposing the relief sought by Paris, is able and willing to serve the requirements of Paris directly under the terms and conditions set forth in prior proposals (set forth *infra*, pp. 10-14 [10a-15a]), or under any other conditions acceptable to the parties and approved by the Commission.

In the past KU has aided both Paris (with emergency service) and East Ky (with coordinated and efficient operation of their interconnected systems³). What it objects to in this proceeding is the effort to put it in a position the Commission may not require and which it feels might ultimately lead to wheeling itself out of the power business in its Paris service area.⁴ Paris, on the other hand, is, among other things, attempting to maintain its independence and freedom of action with respect to the sources from which it may obtain its power requirements in the future. Paris, however, failed to realize, or ignored, the fact that this objective can be accomplished under a Commission-prescribed, or approved, service agreement.

Company which constructed and will operate the Cardinal plant on behalf of the joint owners, is one of the six affiliated operating electric utilities comprising the seven-state American Electric Power System (AEP System). The Commission's jurisdiction over wholesale sales for resale made from parts of AEP's interstate power pool to municipalities and cooperatives was recently affirmed, *Indiana & Michigan Electric Co. v. Federal Power Comm'n.*, 365 F. 2d 180. KU, the defendant in the instant proceeding, operates a smaller but somewhat similar interstate power pool system which is interconnected with the AEP System.

³East Ky owns and operates two steam generating plants and a system of transmission lines supplying distribution systems to its member cooperatives in central, southern and eastern parts of Kentucky. East Ky's two generating plants are not tied together with East Ky's own transmission lines but, pursuant to voluntary agreement, are tied to KU's transmission system which is interconnected at some nineteen points with East Ky's lines. Some of East Ky's loads are served off KU's lines. In like manner, East Ky serves certain of KU's loads. (Tr. 421).

⁴In KU's view, the interconnection sought by Paris is not for the benefit of the public generally or the consumers of electric energy in the Paris area, but is primarily designed to promote the business interest of Paris and East Ky in the operation thereof in competition with KU.

The important questions presented are whether (1) municipalities and REA-financed generating cooperatives are subject to the Commission's jurisdiction, and (2) the Commission has the power to direct a public utility (i.e., a company subject to regulation under Part II of the Act) to interconnect, or permit the interconnection, of its transmission facilities with the electric system of a municipality for the purpose of wheeling power and energy for the municipality and a REA-financed cooperative.

KU is admittedly a "public utility" subject to the jurisdiction of the Commission in the respects provided by the Act. It owns and operates generating, transmission and distribution facilities throughout a large part of Kentucky, its wholesale customers including a number of municipalities. Pursuant to voluntary undertakings, KU's transmission system is connected with, and its generating plants are operated synchronously with, generating plants owned by others located both within and without Kentucky, including those of East Ky and Tennessee Valley Authority.

By its Complaint, Paris requests the Commission to (1) direct KU to permit the interconnection by Paris, at a point within the City, of its municipal electric system with KU's 69 kv transmission line which serves KU's electric distribution system in Paris and vicinity⁵—for the purpose

⁵KU's facilities include a 69 kv transmission line extending through Paris. This line affords a two way feed of power to the area. KU also owns and operates a 33 kv transmission line extending through Paris which provides still another source of power and energy in the case of emergency. KU's 69 kv line is only 1000 to 1500 feet distant from the Paris generating station. The cost of extending a line to connect the Paris system to KU's 69 kv line would be nominal. It would also eliminate the need for Paris to construct at its own expense, pursuant to the terms of the Paris-East Ky agreement, approximately eight miles of transmission line to tap an East Ky 69 kv line running through Bourbon County east of Paris. (See n. 14, *infra*)

KU serves that part of the City of Paris and environs not served by the Paris municipal electric system. It has operated its distribution system in the Paris area continuously since 1923. Its present franchise will expire in 1977. Paris has operated in competition with KU since the construction of its system in 1932.

KU now provides electric service to approximately 750 customers in Paris and about 2500 outside, but in the immediate vicinity of Paris. The Paris municipal system supplies slightly more than 2100 metered outlets inside, and about 27 outside, the city limits.

of wheeling power and energy for Paris and East Ky, and (2) accept for filing and approve the contract dated August 31, 1965, between Paris and East Ky providing for the purchase and exchange of power and energy by and between Paris and East Ky. As pointed out (n. 3 *supra*), East Ky's system is already interconnected with KU's system at nineteen points.

The Commission may not grant either of Paris' requests for it does not regulate the activities of municipalities and REA-financed cooperatives with respect to their wholesale rates or otherwise. It is therefore unnecessary for the Examiner to consider the contentions of the parties which rely upon the mistaken assumption that the Commission will regulate *all* interstate wholesale sales for resale, including those made or proposed to be made by Paris and East Ky via the use of KU's interstate power pool system.

As to Paris' first request for an interconnection for the purpose of requiring KU to wheel power for Paris and East Ky, the legislative history of the Act makes clear, and the Commission and the Courts have recognized, that the Commission lacks authority to require private utilities to wheel power generated by publicly owned plants * * *. And by its Opinion No. 511 issued January 5, 1967, *Dairyland Power Cooperative, et al.*; see also order of the Commission issued January 6, 1967, in *Salt River Project Agricultural Improvement and Power District, et al. v. Colorado-Ute Electric Association, Inc.*, Docket No. E-7306, the Commission determined REA-financed cooperatives to be instrumentalities of the United States exempt from Commission regulation under Part II of the statute by Section 201(f).⁶ Consequently cooperatives are not deemed to be public utilities within the meaning of the Act. Because

⁶Section 201(f) provides that no provisions of Part II of the Act "shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing * * *."

municipalities are likewise exempt from Commission regulation, the Commission, for this reason alone, does not have jurisdiction to grant the second request of Paris calling for the filing and acceptance of the proposed Paris-East Ky agreement.

* * *

Because Paris is a "person" within the meaning of Section 202(b) of the Act and entitled to its benefits * * *, the Commission may direct KU to provide needed service directly to Paris if Paris is now unable to enter into a voluntary agreement satisfactory to it and KU. * * * The power of the Commission to enter such an order is plenary, subject only to the limitations imposed by Section 202(b), none of which would be infringed.*

Accordingly, the Complaint, filed under Section 202(b), should not be dismissed insofar as relief to Paris is cognizable under that section. Paris says it will "do its best to make the most of any order of the Commission in the determination of this controversy." Jurisdiction will therefore be retained in this proceeding until an agreement acceptable to the Commission is voluntarily entered into—within the time prescribed herein—by KU and Paris and is filed, or in the event they are unable to reach agreement, until the terms and conditions of an appropriate arrangement can be prescribed by the Commission—after further hearing if necessary. There can be no doubt as to whether an interconnection between the KU and Paris systems should be directed for the purpose of enabling the sale and

*Under Section 202(b), no interconnection or sale or exchange of energy may be ordered (1) if it will place an "undue burden" upon the public utility, (2) if it will require the public utility to enlarge its generating facilities, or (3) would "impair its ability to render adequate service to its customers." If none of these limitations are encroached upon by the Commission's order, the sole criterion is whether the Commission's action is "necessary or appropriate in the public interest." This criterion is abundantly met by the facts, as well as the position of the parties, in this case.

exchange of energy between them. The prior negotiations carried on by KU and Paris, as well as the facts of record, clearly reflect recognition of this situation.

In 1965 KU had a peak demand on its system of 702,000 kw and a generating capacity of 942,000 kw—a reserve equal to 34 percent. It is therefore able to supply the demands on its system as well as to supply the power and energy required by Paris. As KU's counsel freely admit, KU "has the ability to serve and the capacity to serve all types of loads, including Paris' load."

The Staff of the Commission recognizes that at least until 1971, or during the full term of the power contract KU has offered to Paris, Paris may purchase energy under KU's proposal "at a much lower total cost" than if the energy is purchased from East Ky.

Counsel for Paris seem to agree, saying that whether an "exchange agreement between Paris and KU would provide lower cost power than the one entered into between Paris and East Kentucky depends on how the load grows. Admittedly in the early stages of such an agreement, if KU makes available secondary energy, Paris would likely obtain power at a lower cost with it than with East Kentucky." Their claim is that "if Paris obtains new industry this picture could change rapidly."

Conjecturing aside as to whether Paris will be able to attract new industry, it seems appropriate to point out that if what Paris desires is new industry, its chances of obtaining it during the next five years would be improved by purchasing lower cost power from KU under its previously proposed five-year contract. At the expiration of that period the parties and the Commission could then give consideration to changed conditions—permitting or directing continued service, if still desired by Paris, in the manner dictated by circumstances and the public interest.

• • •

Procedural Background

Paris filed its Complaint on October 7, 1965. KU answered it on November 9, 1965, later supplementing that Answer with Commission approval.

By order issued March 31, 1966, the Commission set the matter for a prehearing conference held April 20, 1966, and for hearing held August 18-19, 1966.

By agreement of counsel, the record includes the transcript of the prehearing conference; interrogatories answered by Paris in response to KU's requests and by KU in response to Commission Staff requests; and a stipulation of certain facts.

Main and reply briefs were filed by Paris, KU and the Commission Staff. The only intervenor in the proceeding, Public Service Commission of Kentucky, filed a memorandum brief in support of its intervention.

East Ky did not elect to become a party to the proceeding even though it is an active participant in the controversy between Paris and KU. It is now apparent, however, that no order entered in this proceeding would impose any obligation upon East Ky.

The Need Of The Paris Municipal System For Additional Power and Energy

In 1932 Paris constructed, and has since operated in competition with KU, an electric generating plant and distribution system. In 1965 the maximum one hour demand on the City's system was 3,950 kw. The maximum one hour demand in 1966 was estimated by Paris' engineer to be 4,200 kw. Its generating plant presently consists of five diesel generating units having an aggregate capacity of approximately 5,567 kw of which station use requires 100 kw, leaving a net available generating capacity of 5,467

kw.¹¹ Accordingly the loss of either of its largest generators (each having a capacity of 1360 kw) at a time of peak demand would place Paris in serious difficulty because it would result in a capacity deficiency of 93 kw.

As the record shows, the present and estimated demands on the Paris system are such that the firm power capacity of the system was not expected to be adequate in the latter part of 1966 and thereafter. In order to supply the demands on its system it is necessary for Paris either to install additional generating equipment or obtain power from another source or sources.

Paris has operated as an electrically isolated system except for a period of emergency when KU came to Paris' aid.¹²

Savings To Paris Under KU-Paris Proposal

The cost to Paris of obtaining power by the operation of its generating units greatly exceeds the cost to Paris of purchasing power under the terms and provisions of either the Paris-KU proposal (Annex A to the Complaint, as supplemented) or the Paris-East Ky proposal (Annex C to the Complaint). As estimated by Paris' engineer, the cost to Paris in 1966 of generating power with its own units would

¹¹The capacity, date of installation and approximate age of each of its generating units are as follows:

Number of Units	Capacity (kw)	Date Installed	Approximate Age (Yrs.)
1	731	1935	31
1	980	1947	19
1	1136	1950	16
1	1360	1953	13
1	1360	1954	12

¹²In 1959 Paris lost one of its large generating units at a time when another unit was down for maintenance. At Paris' request, KU established a temporary connection with Paris' system and by this means provided emergency service. For that service KU's charge averaged 13 mills per kwh. (Tr. 169, 358)

At Paris' request, KU supplied an industrial customer inside of Paris during the period from 1952 to 1960. (Tr. 354)

amount to \$149,268, whereas the cost of obtaining power under the Paris-KU proposal would amount to \$80,931, or a savings to Paris of \$68,336.

By purchasing power under the Paris-KU proposal rather than under the Paris-East Ky proposal sought to be made effective here, Paris would save a substantial sum. As compared with Paris constructing 8.7 miles of transmission line and purchasing power from East Ky, the savings to Paris under the Paris-KU proposal would amount to \$123,819 in the first five-year period.

Background Of Controversy

After extended negotiations beginning in 1951, an engineer for Paris presented a draft of agreement (Annex A to the Complaint) to KU. In a letter received by KU on March 12, 1965, Paris' engineer stated that he had been instructed in preparing the draft to expect an acceptance or rejection of the proposal by March 22, 1965. On that date, KU advised Paris of its acceptance of the proposal. Thereafter, representatives of Paris raised various objections to Paris' own proposal, already accepted by KU, and it was never executed by Paris.

Subsequently, on or about August 12, 1965, KU submitted to Paris a supplement to Annex A in the form attached to the Complaint as Annex B, reducing the term of the proposal (Annex A) from ten to five years and changing the interval for measurement of Paris' demand from 15 to 30 minutes. Thereafter on or about January 19, 1966, or after the execution of the Paris-East Ky agreement on August 31, 1965, KU tendered to Paris a draft of a second supplement (Tr. 379-80; Exh. 2) to Annex A in which KU agreed, *inter alia*, to furnish secondary energy to Paris as desired, subject only to KU's right to curtail or interrupt the supply of secondary energy for not exceeding 400 hours in any period of twelve consecutive months (8,760 hours)

or 1,000 hours in the five consecutive years of the contract (43,800 hours). Thus KU's latest offer assured Paris of a continuous supply of secondary energy for about 95 percent of the time in any one year and approximately 98 percent of the time during the five year period.¹²

While the offer evidenced by Annex A, as modified by the supplement, Annex B, and the second supplement hereinabove referred to, tendered by KU to Paris, did not constitute an offer to supply firm power, the President of KU testified that KU has always been and is now willing to enter into an agreement to supply Paris with whatever amount of firm capacity it needs in the future (Tr. 401). Further, KU, in its Answer filed herein (par. 21), stated that it is also willing to supply energy to, and interchange energy with, Paris under any other terms and provisions acceptable to the parties and approved by the Commission.

A witness for Paris testified that at the time East Ky was consulted there were two main points of difference between representatives of KU and Paris. First, instead of the right to interrupt the supply of secondary energy, Paris wanted KU to guarantee that secondary energy would be available at all times and that it would be furnished whenever the City requested. Second, Paris wanted KU to allow it freedom to buy from other sources that might become available to it in the future—a right not prejudiced by KU's pending offer. (Tr. 404) With reference to the part played by East Ky, the Paris witness testified:

East Kentucky did not seek the contract [with Paris]. We sought it. As I have testified, we had been negotiating with KU for a long time and were in receipt of

¹²Under KU's pending offer to Paris, KU does not intend to exercise its right of interruption except to the extent it may be required to do so, and has no expectation of interrupting the supply of secondary energy (Tr. 380-1).

In this regard it may be noted that the East Ky-Paris agreement does not obligate East Ky to supply Paris a substantially unlimited supply of secondary energy, nor with firm capacity (Tr. 390-94).

their last proposal calling for a cost of 12 mills per kwh before we turned to East Kentucky and asked our engineer to seek a proposal from that company. I always understood up to the very last that East Kentucky merely wanted us to be treated fairly and did not seek a contract with us if we could get what we wanted from KU. (Tr. 131)

Whether or not Paris was entitled to "what it wanted from KU" could have been, and still can be, determined by the Commission under the provisions of Section 202(b) authorizing the Commission to "prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonable due any of them." But instead of then seeking the Commission's help, Paris turned to East Ky.

As a Paris witness testified, at the final meeting held August 17, 1965, between representatives of Paris and KU—

* * * There was considerable discussion of the matter * *. [Paris' special counsel] mentioned those two points * * regarding the guarantee of secondary energy and regarding the assurance of our "open door". On the first point [the President of KU] said we would just have to trust them; that they could not afford to change the contract to guarantee secondary energy because of the company's relations with other cities; on the second point [the President of KU] said he was unwilling to go beyond the language in the original proposed contract and that he could not assure the City that if it sought to establish an additional connection with East Kentucky, for example, that KU would not seek to oppose it. With these frank admissions * *, it appearing that the parties could

not get together, [the President of KU] and his party departed from the meeting and our Commission adopted a formal resolution terminating its negotiations with KU and directing the preparation of the final contract with East Kentucky. (Tr. 123-124)

As the Examiner has pointed out, not only will a Commission-approved arrangement assure Paris' "open door" but Paris' right thereto is acknowledged in KU's pending offer. (Tr. 404) That offer also assures Paris of practically a continuous supply of secondary energy. Regarding KU's position that it could not afford to change the contract to guarantee secondary energy because of KU's relations with other cities, it seems appropriate to mention that KU may not provide preferential treatment to Paris over other cities. Other customers must be treated on a parity with Paris because of the fundamental regulatory principle that all customers falling into the same class are entitled to receive the same kind of service under the same or similar conditions, and are entitled to the same rate.

The East Ky-Paris agreement needs no extended discussion since the Commission's *Dairyland* decision holds REA-financed cooperatives engaging in interstate activities—activities beyond those which the states may and do regulate—to be beyond the scope of its jurisdiction. Suffice it to say that the proposal was in the form of an interchange agreement (Annex C to the Complaint) and was executed by East Ky and Paris as of August 31, 1965. The agreement allows Paris to reduce its installed reserves to 10 percent of Paris' peak load; to purchase economy energy at 5.6 mills per kwh and to purchase deficiency capacity at \$13.80 per kw per year. Energy with firm capacity would bear the same charge of 5.6 mills per kwh. After East Ky came into the picture, KU offered its similar proposal but with a capacity charge of \$1.50 per kilowatt month (or

\$18.00 per kw year) and an energy charge of 5 mills per kwh. Under KU's offer, Paris must maintain 15 percent reserves. KU advised Paris that if it provided its own substation, it might lower its energy charge to 4.5 mills per kwh.

The East Ky-Paris agreement is for a period of ten years (and from year to year thereafter until terminated on not less than three years' notice), whereas KU agreed to a five year contract. Additionally, the cost of power to Paris under KU's pending offer is substantially less than the cost of power under the East Ky-Paris agreement, and under KU's offer Paris would have available not only a dependable two-way supply of energy over KU's existing 69 kv transmission line but would have an additional emergency supply through KU's 33 kv line.¹⁴

It appears to the Examiner that the position taken by Paris in this proceeding may have been influenced by the interests of East Ky. When asked why he did not go along with KU's proposal that offered a more attractive rate, the Commissioner of Public Property and Mayor problem of the City of Paris testified *inter alia*:

¹⁴Paris' request that the Commission direct KU to permit interconnection by Paris to KU's 69 kv transmission line at a point within the City seeks to eliminate the need it would otherwise have, if it obtains East Ky service, to construct approximately eight miles of transmission line to tap an East Ky line running through Bourbon County east of Paris. That is to say, the East Ky-Paris agreement provides that delivery of power and energy under the contract be made at a point close to Stone Road (about 8.5 miles from Paris) on East Ky's 69 kv transmission line, where East Ky agrees to construct, operate and maintain necessary switching facilities, and from which point Paris agrees to construct, operate and maintain a 69 kv transmission line to its generating plant in Paris together with a substation adjacent to its generating plant, and suitable relaying, synchronizing, metering and control equipment.

Paris claimed that the construction and operation of the eight-mile line to connect its system with that of East Ky is to be "compared to zero added cost if Paris obtained the KU interconnection" as requested in the Complaint. This claim, however, is untenable for KU would be entitled to reasonable compensation for the wheeling service performed for East Ky and Paris if rendered. On the other hand, if KU serves Paris there will be no separate transmission charge for the rates it charges Paris would compensate KU for all of its costs including transmission costs.

Well, some of us were inclined to go along with the KU proposal at that time. However, upon more careful consideration and *after advice and consultation with our engineers and our attorneys* we decided the proposed contract was not sufficiently clear in a number of respects and that clarification should be sought and further consideration given. * * (Tr. 120) (Italics supplied)

And again as follows:

In very recent months we have obtained the services of [an engineering firm], and * * a special utilities counsel. In the negotiations that passed back and forth between the City, Kentucky Utilities Company and East Kentucky RECC we were relying heavily upon the advice of our engineers and attorneys. We weighed very carefully the alternatives confronting the City as they were explained to us by the engineers and attorneys. * * (Tr. 132) (Italics supplied)

The engineer involved is presently employed as an engineer for Kentucky Statewide RECC and other cooperatives in Kentucky. Paris' special counsel is East Ky's General Counsel.

**Prior Contracts Between KU And East Ky
Do Not Apply To Paris**

* * *

Paris' claim is at odds with the position of the Kentucky Commission which certificated and has actively regulated East Ky's services rendered throughout Kentucky. In the "Burnside" certificate proceeding KU opposed the grant of the certificate to East Ky. It alleged that the gen-

erating capacity East Ky was seeking was in excess of the needs of the distribution cooperatives and that East Ky sought such capacity, and intended to use it if authorized, for the purpose of competing with KU for service to municipalities and others. The Kentucky Commission's order in that case reaffirmed the principle set forth in a 1954 KU-East Ky contract that East Ky and its member distribution cooperatives should not sell electricity to municipalities. (See n. 19 *infra*).

* * *

It is of interest to point out in passing that the Kentucky Commission states that "As the rural cooperatives in Kentucky have grown and extended their operations from the rural areas where they began, nearer, and in many instances into, areas served by the investor-owned utilities, many problems have arisen by reason of competition between the investor-owned utilities and the rural cooperatives. * * [T]he Kentucky Commission has exercised its jurisdiction in numerous instances in deciding which of two competing utilities should serve the particular customer or load in dispute."

* * *

**Congress Has Not Authorized The Commission To Direct
KU, By The Interconnection Of Its Facilities With
Those Of Paris, To Wheel Power And Energy For
Paris And East Ky, Or To Require The Use Of
KU's Transmission Facilities For Such Purpose**

The request that the Commission enter an order which would require KU to wheel power for Paris and East Ky must be considered in the light of the fact that Parts II and III of the Act were enacted in 1935¹⁷ at a time of great struggle between advocates of public and private power, the opponents of public power expressing their fears of competition and arguing that governmental power operations were supported by competitive advantages. This was part of the context in which the proposed new Parts II and III of the present Act were considered, and is the frame of reference for KU's citations from the legislative history which substantiate its contention that whether or not Paris is determined to be a "person" within the meaning of Section 202(b), the Act does not empower the Commission to enter an order to require KU to wheel power for Paris, a municipality, and East Ky, a REA-financed cooperative which *Dairyland* holds to be an instrumentality of the United States.

The power to require a public utility such as KU to transmit energy for others, or to permit the use of its facilities by others, is not included in the powers of the Com-

¹⁷The Federal Power Act of June 10, 1920, created the Commission and related only to the licensing, construction and operation of hydroelectric projects. It was amended, expanded and made Part I of the present Act, and Parts II and III were added to that Act, by Title II of the Public Utility Act of 1935 (49 Stat. 838).

The authority of the Commission under Part I pertaining to hydroelectric projects is based upon the national power over navigable waters and public lands. The Commission's authority under Part II (of which Section 202(b) is a part) represents an exercise of the commerce power over public utilities engaged in the interstate transmission and sale of electric energy at wholesale for resale. Part III relates to such companies, and to licensees under Part I, and carries the administrative and procedural provisions of the Act.

mission enumerated in Section 202(b) of the Act which are to—

direct a public utility * * to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons * *.

Further, the authority to direct a public utility to wheel power was initially requested of Congress in the original bills (S. 1725 and H. R. 5423). This authority, however, was rejected in all amendments by Congressional committees and by Congress in the Act as finally adopted. Thus the matter of wheeling power was left to the voluntary action of public utilities.

The legislative history relied upon by KU is in part set forth in *Idaho Power Co. v. Federal Power Comm'n.*, 189 F. 2d 665, 669, n. 4,¹⁸ and in *P. U. C. of California*, 345

¹⁸The *Idaho Power* case involved a condition to a license issued under Part I of the Act requiring the company to wheel power generated in power plants owned by the United States, such power to be wheeled to the extent of excess capacity in the company's lines and with full compensation to the company. The lower court's decision relied upon the provisions of Part II of the Act, whereas the Supreme Court, finding that Parts I and II provided different regulatory schemes, found Part I controlling.

The company contended that the Commission could not lawfully attach the wheeling condition to its license order, and the Court of Appeals, relying upon the provisions of Section 201(f) of Part II, agreed. On certiorari in *Federal Power Comm'n. v. Idaho Power Co.*, 344 U. S. 17, the Supreme Court held that the provisions of Part II of the Act, particularly Sections 201(f) and 202, "do not deal with the grant of licenses" and do not limit the Commission's power granted under Part I to impose license conditions. It therefore reversed the decision of the lower court.

Referring to the opinion below, the Supreme Court said at page 22, "Since that [Section 202(b)] power was not extended to the United States, the [D. C. Circuit] court concluded that a license under Part I of the Act could not be conditioned on an interconnection with federal[ly generated] power." This has reference to the failure of Section 202(b) to require an investor-owned utility to wheel power for the United States. The Court pointed out that the provisions of Part I of the Act "give ample authority to the Commission to attach the condition imposed" and that it "cannot construe the limitation on the new powers

(Footnote continued on following page.)

U. S. at 313-314, n. 23. One of the two architects of Part II of the Act was the Commission Solicitor DeVane. Of the many similar answers he gave in answer to questions by members of the House Committee, the following will suffice for the purpose of this decision:

Mr. Mapes. Is it the purpose to compel the privately owned transmission companies to carry the energy of municipal projects as well as private projects?

Mr. DeVane. No, sir * * * * It is not intended to give the Commission power to require the private lines to take on any power generated by municipal plants or by any Government plant. (p. 546, Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess. (1935))

Moreover, the Commission's order entered September 2, 1965, in *Crisp County* referred to the footnote in *P. U. C. California* (345 U. S. at 313-314, n. 23) and stated:

* * * It is true that this case indicates (p. 313 at footnote 23) that Congress intended to preclude the Commission from requiring any investor-owned company to wheel power from a federal or state or municipally owned generating system to a customer of such system. * *

conferred by Part II as a repeal by implication of the powers over licensees that are deeply engrained in Part I of the Act and put there by Congress for the purpose of protecting the public domain."

The *Idaho Power* decisions of the Supreme Court and the lower court are the only decisions involving the power of the Commission to compel a public utility to wheel power for others. They indicate rather clearly that the power of the Commission to require interconnections under Part II of the Act for the purpose of wheeling power does not extend to the United States, a State, a municipality, or instrumentalities thereof. Since then there have been no pertinent changes in the Act.

Counsel for KU call attention to the fact that the government court briefs in the *Idaho Power* and *P. U. C. of California* cases in effect concede the lack of Commission power to require public utilities to wheel power for government agencies.

It is therefore apparent that the Commission is without authority to compel KU to interconnect its system with that of Paris for the purpose of requiring KU to wheel power for Paris and East Ky.

The Position Of The Commission Staff

* * *

On the mistaken assumption that the Paris-East Ky agreement would be regulated by the Commission, the Staff conceded that this agreement presently has no status before the Commission because, notwithstanding its tender for filing by Paris, East Ky "must tender such agreement also."¹⁹

¹⁹KU attacks the validity of the Paris-East Ky agreement on a number of grounds and argues that the agreement "should not be accepted or approved by the Commission unless and until the Commission determines to exercise jurisdiction over East Ky, and until the validity and enforceability of that agreement is established."

East Ky was organized under Chapter 279 of Kentucky Revised Statutes. It carries out its operations pursuant to certificates of public convenience and necessity issued to it by the Kentucky Commission. KU contends, *inter alia*, that these certificates and the representations made by East Ky in its applications therefor preclude East Ky from serving Paris. It refers to the fact that, over its objections, the Kentucky Commission granted a certificate to East Ky to construct its Burnside generating facilities, but stated in its certificate order: "The Commission feels an obligation to state in this case its policy in respect to service areas and loads where controversy exists between East Kentucky, its Member Cooperatives, KU, or other utilities." The Kentucky Commission then said that in the future it would "follow the principles set out" in a 1954 agreement providing for the interconnection of transmission systems of KU and East Ky. In the 1954 agreement it is stated: "East Ky will not furnish nor deliver electric service directly or through its Members to any incorporated municipality not now receiving REA service and will so limit the use of power it supplies to its Members in its power contracts with them, except as may be agreed to by the parties hereto."

The Examiner agrees with the position of the Staff and Paris that if FPC had jurisdiction over the Paris-East Ky arrangement its jurisdiction would be exclusive for Part II of the Act preempted the regulatory powers over the transportation and wholesale sale for resale of electric energy in interstate commerce. This does not mean however, that the Commission would not give appropriate consideration to the views of the Kentucky Commission; representations made to it in certificate applications on which it relied; and the policy created and followed by

(Footnote continued on following page.)

East Ky has not joined in Paris' application. Its lack of participation effectively denied inquiry into, and cross-examination with respect to, its interest, plans, etc. This lack of participation in turn handicaps the decision herein to the extent of the gaps in the evidence and the need for a better showing as to the validity of East Ky's agreement with Paris.

* * *

This unusual proposal asks the Commission to direct KU, which has already accommodated its system operations to East Ky's needs and is able and willing to do so with respect to Paris, to not only wheel power and energy for Paris, but to devote excess capacity in its transmission system to the use of rivals, and to do so to KU's possible detriment. The Staff makes this request notwithstanding its conclusion that until 1971, or during the full term of the proposed KU contract, Paris may purchase energy under the KU proposal "at a much lower total cost" than if the energy is purchased from East Ky. The Examiner con-

the Kentucky Commission. This is particularly true where the Kentucky Commission's action and policy do not stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress. As the Supreme Court stated in *Public Utilities Co. v. United Fuel Gas Co.*, 317 U. S. 456, 457, with respect to the Natural Gas Act which was patterned after the Federal Power Act, "Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the * * industry—federal and state regulatory bodies operating side by side, each active in its own sphere."

At one point in their brief counsel for KU recognized the gap found to exist in *Attleboro* which "declared state regulation of interstate transmission of power for resale forbidden as a direct burden on commerce" (345 U. S. at p. 304; * * *). They do so by expressing the fear that "unless the Commission actively undertakes to regulate rates of generating cooperatives * * or should Congress enact into law the proposal to exempt generating cooperatives from the regulatory powers of the Commission (T. 436), service to Paris and East Ky would be unregulated service. Neither the Commission nor the Kentucky Commission would regulate the wholesale rates charged by East Ky."

siders the Staff's request to be wholly unjustified even if the Commission has jurisdiction to require public utilities to wheel power for others. It would not be in the total public interest. It is not a part of KU's expected duty as a public utility.

In this proceeding, the Staff, instead of becoming too preoccupied with facility coordination, should have kept more in mind the fact that cooperatives have for the most part fulfilled their original purpose, and in that process gave stimulus to rural expansion by investor-owned companies from which the electric energy initially distributed by cooperatives was mainly purchased. Are cooperatives now to be permitted to take on expanded roles of the type here recommended by the Staff? How can cooperatives expand their service (other than providing for the growing need for electric energy within service areas they have developed) if they are not content to stick with their original purpose and service areas? The only place they can go, as East Ky apparently hopes to go here, is into the service areas of others. This attempt is understandably alarming to KU, as it will be for all investor-owned companies, for if East Ky were to succeed here, the door would be opened and the beachhead cleared for other cooperatives wanting to do the same thing.

While investor-owned companies have advantages not enjoyed by cooperatives, it is a matter of common knowledge that cooperatives have the distinct advantages of (a) 2 percent 35-year loans; (b) exemption from most taxation; (c) more and more generating capacity of their own; and (d) sharing first call on government generated power. With these advantages cooperatives may be able, if they desire and are not barred from doing so, to increasingly engage in aggressive competition with investor-owned companies having gigantic private investments to protect. In the Examiner's view, it does not appear essential for co-

operatives to progress into areas adequately served by others in order to meet the purpose for which they were created. Investor-owned companies, on the other hand, must either continue to grow or find themselves on a dead end street.

There can be no doubt but that in fulfilling their intended purpose, a purpose which could not have been fulfilled in any way other than with the use of low-cost financing, cooperatives performed an outstanding national service by bringing rural America into the main current of American life.²⁰ But some cooperatives, including East Ky, seem to be attempting to outrun the intentions of REA's Congressional founders. If as Staff counsel believes, public utilities can be required in the circumstances of this case to wheel power for cooperatives, such a requirement might be found not to be to the mutual advantage of the parties and to be tantamount to requiring public utilities to help dig their own graves in certain areas.

In this case there is no need to require KU to wheel higher cost power and energy for Paris and East Ky. Moreover, what the voters in any given service area give in franchise rights they can fail to renew. When KU's existing franchise in the Paris area expires in 1977, the voters will do what they think best on the basis of the then existing conditions.²¹ The present day situation with respect to isolated electric systems like Paris' is well described in the Commission's recent *Crisp County* decision (Op. No. 508). The Commission said:

- * * * The electric power industry is continuing its historic trend toward large units in order to attain the

²⁰See "There's No Stopping REA—Or Is There?", *Fortune Magazine*, February 1963.

²¹KU presently owns and operates electric facilities in Paris under a twenty year franchise created by Paris and sold to KU in 1957 as the result of an election in which, by a vote of 1,238 to 928, the citizens, in an initiative proceeding, directed the creation and sale of this franchise (Tr. 355).

In the past there has been a difference of opinion between elected officials of the City of Paris and the resident voters of the municipality (Tr. 356).

economies inherent in large scale production of energy. The industry also has accelerated the pace of its attempts to coordinate and to reduce reserve capacity in order to utilize more efficiently its capital investment and improve bulk power supply reliability. In this context, the disadvantages of small isolated systems which generate all of their own energy and rely only upon their own limited resources, have become more evident and more critical with regard to the cost and reliability of service. The ever-widening gap that technology has created between large interconnected systems and isolated systems, in the economical use of capital and the efficient production of energy, threatens the survival of many small systems. Unless isolated systems can enter into coordination agreements with their larger interconnected neighbors, their outlook appears bleak, indeed.

* * *

The Examiner concludes this decision by adverting to the assurance given by KU's President that "if the ultimate resolution of the present differences is that KU is to supply the power needs of the Paris system, we will work together with Paris in every respect to see that the Paris system and its customers at all times receive the best possible service we are capable of furnishing." (Tr. 356)

FINDINGS

- (1) KU is a "public utility" as defined in the Act and is subject to the jurisdiction of the Commission in the respects provided therein.
- (2) Paris, a Kentucky municipal corporation, is a "person" within the meaning of Section 202(b) of the Act and entitled to the benefits thereof.

- (3) East Ky is a REA-financed cooperative organized under the laws of Kentucky and is the type of cooperative the Commission's *Dairyland* decision holds to be exempt from regulation under Part II of the Act.
- (4) The interconnection agreement dated August 7, 1963, between KU and East Ky (Annex D to the Complaint), as amended by agreement dated October 27, 1964, does not contemplate or require that KU will provide East Ky service to Paris.
- (5) Following extended negotiations between Paris and KU, an engineer representing Paris submitted to KU a proposal in the form of a definitive interchange agreement, Annex A to the Complaint, which proposal KU accepted by letter, advising Paris that KU was ready to execute signature copies of the agreement when prepared. KU also offered, pursuant to supplements tendered by it to Paris in the form of Annex B to the Complaint and Exhibit 2, to change the terms of Annex A favorable to Paris, but Paris declined to execute the modified agreement offered by it to KU.
- (6) East Ky made a proposal in the form of an interchange agreement (Annex C to the Complaint) to supply power to Paris, which proposal was accepted by Paris and that interchange agreement was executed by Paris and East Ky as of August 31, 1965. The record does not disclose that this interchange agreement is binding upon the parties in that it does not appear to have been approved by REA's Administrator, the approval of whom is, by the terms of the agreement, made a condition to its binding effect.
- (7) KU is able and willing to supply power to Paris, either pursuant to the terms and conditions of the interchange agreement submitted by Paris to KU for its acceptance, supplemented as aforesaid, or pursuant to such other

terms and conditions as may be agreeable to the parties and approved by the Commission.

- (8) An interconnection between the KU and Paris systems for the purpose of selling and exchanging energy and coordinating their requirements is necessary and appropriate in the public interest.
- (9) The operation of an interconnection between the KU and Paris systems for the purposes mentioned in paragraph (8) above will not (a) place any undue burden upon KU, (b) require KU to enlarge its generating facilities for such purpose, or (c) impair its ability to render adequate service to its customers.
- (10) By its request that the Commission direct KU to permit interconnection by Paris to the 69 kv transmission line of KU extending through Paris, Paris seeks an order requiring KU to wheel power for Paris and East Ky, an order which the Commission does not have jurisdiction to enter under the Act.
- (11) It would not be in the public interest or the interest of the electric consumers of Paris during the next few years for the Commission to enter an order which would have the effect of permitting East Ky to furnish power to Paris, even if the Commission had jurisdiction over the East Ky-Paris agreement, whereas it would be in the public interest for the Commission to permit or require KU to sell energy to and exchange energy with Paris under the terms and provisions of an arrangement agreed upon between Paris and KU, if acceptable to the Commission, or fixed by the Commission after further hearing.
- (12) The present record does not permit an accurate determination by the Commission of the terms and conditions of an appropriate arrangement under which power and energy is to be sold to and exchanged by KU and Paris. Accordingly, to facilitate service by

KU to Paris without further delay and with savings to Paris, the opportunity should be offered in the first instance to KU and Paris to determine and agree upon the terms and conditions of an arrangement.

- (13) The record shows that there is urgent need for an immediate interconnection of the KU and Paris electric systems for emergency purposes, the establishment of which should not await the consummation of the arrangement pursuant to which KU and Paris are to sell and exchange power and energy. KU should therefore be required to immediately interconnect its 69 kv transmission line, at a point in the vicinity of Paris' 60 kv stepdown substation, with Paris' system for the transmission of emergency power and energy from its system to Paris, such interconnection to be suitable for permanent use in carrying out the sale and exchange of power and energy pursuant to the terms and conditions of the arrangement agreed upon—or hereafter fixed by the Commission in the event KU and Paris are unable to reach a satisfactory agreement acceptable to the Commission.
- (14) Whether or not Paris should bear the cost of the 1000-1500 foot line necessary to interconnect the KU and Paris systems depends upon whether KU's tariff with similar customers requires such cost to be borne by the customer, it being necessary that all customers be treated alike by KU in this regard.
- (15) The cost to Paris of obtaining power by the operation of its generating units would exceed the cost to Paris of purchasing power under the terms and provisions of either the Paris-KU proposal (Annex A to the Complaint, as supplemented) or the Paris East Ky proposal (Annex C to the Complaint).

ORDER

WHEREFORE, IT IS ORDERED, subject to review by the Commission:

- (A) KU shall within twenty days after this order becomes the final order of the Commission establish emergency connection of its electric facilities with those of Paris, at a point within the City, this being necessary and appropriate in the public interest for the purposes of the Act, particularly Section 202(c), to assure adequate electric service to Paris' customers.
- (B) If KU and Paris fail to reach agreement concerning the establishment, as well as the payment of the cost of, the emergency interconnection ordered in paragraph (A), such interconnection and service shall be subject to such terms and conditions as may be fixed by supplemental order of the Commission pursuant to Section 202(c) of the Act.
- (C) KU shall notify this Commission when the emergency interconnection ordered in paragraph (A) is established and operative.
- (D) KU and Paris shall begin negotiations immediately for the purpose of attempting to determine and agree upon the terms and conditions of a service arrangement pursuant to which KU is to sell energy to and exchange energy with Paris. If no agreement is reached within twenty days from the date this order becomes the final order of the Commission, the Commission shall be so advised by both KU and Paris in writing, the Commission being fully advised as to the reasons for their failure to reach agreement. Thereafter the matter will be set for further hearing on a date to be fixed by the Commission.

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- (E) In the event KU and Paris, acting in good faith pursuant to paragraph (D), are able to reach an agreement mutually satisfactory to them, such agreement shall be immediately filed with the Commission for its approval and adoption if, in the Commission's opinion, it is found to be a reasonable resolution of the proceeding instituted by Paris herein.

(s) Francis L. Hall,
Presiding Examiner.

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Commission correctly held that it has no authority to compel an investor-owned public utility to transmit power generated either by a municipality or by an REA-financed cooperative.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21375

City of Paris, Kentucky, Petitioner,

v.

Federal Power Commission, Respondent,
Kentucky Utilities Company, Intervenor.

On Petition to Review an Order of the Federal Power
Commission

BRIEF FOR THE FEDERAL POWER COMMISSION

COUNTERSTATEMENT

Petitioner Paris, a municipality, on October 7, 1965, filed a complaint with the Commission against intervenor Kentucky Utilities ("KU"), an investor-owned public utility (R. 1788-1879). Annexed to the complaint was a contract (R. 1821-1839) between Paris and East Kentucky Rural Electric Cooperative Corporation ("East Kentucky") for the sale and exchange of energy between them (R. 1821-1822). The complaint requested that the Commission "accept as filed and approve" the Paris-East Kentucky contract and "direct KU to permit interconnection by Paris to the KU 69 kv transmission line at a point inside the city of Paris" (R. 1793-1794). The complaint stated that

KU and East Kentucky had numerous interconnections (R. 1791) and that an interconnection between KU and Paris, requiring the construction of less than 1500 feet of 69 kv-line, would enable Paris to receive East Kentucky energy. Paris explained that without such an interconnection it would have to resort to the far more costly alternative of building an 8-mile transmission line to the East Kentucky transmission line (R. 1792-1793).

In answering the complaint (R. 1881-1894), KU questioned the validity of the Paris-East Kentucky contract and opposed the Paris request, offering instead to sell its own energy to, and exchange energy with, Paris at a cost to Paris that would be substantially less than if the energy were obtained from East Kentucky (R. 1884, 1886-1887). This proposal necessarily contemplated the requested interconnection between KU and Paris.

Upon consideration of the hearing record, the examiner's decision, briefs on exceptions thereto and oral argument, the Commission issued Opinion No. 525 (R. 2403-2410), the order here under review. It held that it could not grant either of Paris' requests, i.e., to order KU to transmit energy between Paris and East Kentucky or to approve the Paris-East Kentucky agreement (R. 2406-2407). The Commission stated that, under Section 201(f) of the Federal Power Act, 16 U.S.C. 824(f), App., infra, p. 24, it had no jurisdiction of the activities of municipalities or of REA-financed cooperatives, pointing out that it had held such cooperatives to be government

instrumentalities under Section 201(f) in Dairyland Power Cooperative,
37 FPC 12 (1967), and Salt River Project Agricultural Improvement and
Power District, 37 FPC 68 (1967).^{1/} It held that it was without
authority to compel an investor-owned utility to transmit the power
of government instrumentalities under Part III of the Act. (R. 2407).^{2/}

Since the record showed (R. 155) and the Commission found
(R. 2406) that Paris' firm capacity was not adequate for its peak
load, the Commission found it to be in the public interest for KU to
connect with, and arrange to sell energy to, Paris and it required an
interconnection for this purpose (R. 2409-2410). The order has been
complied with (R. 2420-2420A). An agreement has now been entered
into by Paris and KU for the sale and exchange of energy.

Paris petitioned for rehearing (R. 2442-2447). Its petition was
denied (R. 2452) and the petition for review followed.

1/ On February 15, 1968, this Court affirmed the Commission's holding in Salt River, Docket No. 20960, that it has no jurisdiction of REA-financed cooperatives on the ground that they are not public utilities within the meaning of Parts II and III of the Federal Power Act. Slip op. p. 7.

2/ In these circumstances, the Commission found it unnecessary to decide the issue raised by KU whether the Commission has authority, under Section 202(b), infra, p. 24, to compel one investor-owned public utility to transmit power generated by another for the benefit of third parties (R. 2407).

SUMMARY OF ARGUMENT

As this Court has held in Salt River Project Agricultural Improvement and Power District v. F.P.C., ___ AppDC ___, ___ F. 2d ___ (Docket No. 20960, decided February 15, 1968), to give effect to the purpose of legislative enactments it is appropriate and necessary to examine the legislative history and background. In that case, the Court held more specifically that REA cooperatives were not intended to be, and are not, public utilities regulated under the Act.

The legislative history relied upon showed that the Rural Electrification Act, 7 U.S.C. 901, et seq., 49 Stat. 1363, and the Federal Power Act were aimed at wholly different problems. The latter was intended to achieve reform "in an immense and corrupted industry", while the former was designed, "through rural electric cooperatives, to bring economical electric power to the nine out of ten farms that were then without it". Salt River, supra, slip op., pp. 10-11 (emphasis supplied). In this context, the Commission was warranted in concluding that these cooperatives are government instrumentalities for effectuating the purpose of the Rural Electrification Act and are consequently within the exemption provision of Section 201(f) of the Power Act.

It is also clear from the legislative history that, in an effort to compromise the conflicting views of the public and private power camps, the Commission was to have no authority to require a private (investor-owned) public utility to transmit energy generated by a

public power plant. Although the emphasis in this respect in the Congressional hearings and reports is on federal, state and municipal plants, this history shows that the logic for this restriction on Commission authority was that a private plant was not to be required to transmit energy, generated by a public plant, having low interest rates and taxes and other advantages, to customers for whom both the private and public companies were competing. Thus the cooperatives, as Government instrumentalities receiving many such benefits, are encompassed in the group for which investor-owned public utilities were not to be required to transmit energy.

In any event, municipalities, as political subdivisions of States, are expressly included in the exemption of Section 201(f) and are also expressly referred to in the legislative history as those for which investor-owned public utilities should not be required to transmit energy. And since Paris sought approval of its agreement for the sale and exchange of energy with East Kentucky and for an interconnection with KU so that the latter would transmit energy between them, the Commission was plainly right in holding that it had no jurisdiction either to approve the agreement or to order KU to transmit the energy.

ARGUMENT

THE COMMISSION CORRECTLY HELD THAT IT LACKED AUTHORITY TO COMPEL KU TO TRANSMIT ENERGY GENERATED BY EITHER THE CITY OF PARIS OR EAST KENTUCKY

Both before the Commission and in its brief in this Court, Paris has contended that the Commission should have (1) accepted jurisdiction over the contract between it and East Kentucky which called for an exchange of energy between them (R. 1821-1822, 1824, 1826, 1827, 1828, 1829, 1832, 1833) and (2) required KU to transmit energy generated by both Paris and East Kentucky to complement the exchange arrangement. The Commission, in denying both of these requests as not within its authority, held (R. 2407-2408):

* * * The Commission has no jurisdiction over the activities of municipalities, 1/ or over REA-financed cooperatives which we have held to be a government "instrumentality" under section 201(f) of the FPA. 2/ This Commission does not have to decide whether it can order under section 202(b) a public utility to transmit power for the benefit of third parties since it is clear that the Commission cannot compel a private utility to transmit the power of government instrumentalities under Part II of the FPA. [Footnote omitted.]

1/ Section 201(f).

2/ Dairyland Power Cooperative, et al., Opinion No. 511, January 5, 1967; Order, Salt River Project Agricultural Improvement and Power District, Docket No. E-7306, January 6, 1967.

The soundness of the Commission's view that it has no jurisdiction over the exchange agreement between a municipality and an REA-financed cooperative is confirmed by this Court's recent decision in

Salt River Project Agricultural Improvement and Power District v.

3/

F.P.C., ___ AppDC ___, ___ F. 2d ___, No. 20960, February 15, 1968,
affirming the Commission's view that REA-financed cooperatives are
not public utilities within the meaning of the Federal Power Act.
Since that decision is fully applicable to Paris' claim that REA-
financed cooperatives are public utilities and since it is undisputed
that the Commission also has no jurisdiction over municipalities, such
as Paris, as public utilities, the Commission's conclusion that it has
no jurisdiction over the exchange agreement as a rate schedule is
clearly correct.

While this aspect of the case has now been settled, Paris' claim
that the Commission may, at the behest of a "person engaged in the
transmission or sale of electric energy," require a public utility to
transmit energy to it from an REA-financed generation and
transmission cooperative was not directly decided in Salt River.
As we have noted, the Commission held that "it is clear that the Com-
mission cannot compel a private utility to transmit the power of
government instrumentalities under Part II of the FPA." Paris seems
to concede (Br. p. 30) that this is a correct statement of law. It

3/ The decision was entered subsequent to the filing of petitioner's
brief in this case.

4/ The Court found it unnecessary to pass upon the alternative ground
in Salt River, which is at issue in the instant case, that an REA-
financed cooperative is a government instrumentality within the
exemption provision of Section 201(f) of the Act. Slip op. p. 7.

argues, however, that the service it seeks from KU would not be power transmission (Br. pp. 29-33) and challenges (Br. pp. 9-22) the Commission's conclusion that REA-financed cooperatives are federal instrumentalities within the meaning of the Federal Power Act. In making this latter argument, Paris ignores the facts that, regardless of whether East Kentucky is a government instrumentality, the City of Paris is and that KU would be required also to transmit energy generated by Paris if the Paris-East Kentucky exchange were to be effectuated by use of KU's transmission lines. Hence, if the Commission is correct in holding that it cannot require a public utility to transmit energy of a government instrumentality, the governmental status of the City of Paris is in itself sufficient to support the Commission's action.

We will first show that the Commission cannot require KU to render the service which Paris requests. Secondly, we will show the validity of the Commission's finding that REA-financed cooperatives are federal instrumentalities in the present context.

A. The Commission Was Fully Warranted in Concluding That It Could Not Require KU to Transmit Power For Government Instrumentalities as Requested by Petitioner

The legislative history of Part II of the Power Act clearly establishes that the Commission was to have no authority to require a public utility to transmit energy generated either by a municipality

5/

or any other government instrumentality. And, as this Court recently reiterated in Salt River, supra, in construing a statute it is the purpose of legislative enactments that must be given effect and resort to the legislative history is appropriate for the ascertainment of this purpose. Salt River, supra, slip op. pp. 8-9; United States v. Shirey, 359 U.S. 255, 260-261 (1959); Malat v. Riddell, 383 U.S. 569, 571-572 (1966); Cabell v. Markham, 148 F. 2d 737, 739 (CA2), affirmed, 326 U.S. 404 (1945).

As the Commission stated (R. 2407-2408), the Commission's lack of authority to require a public utility to transmit energy generated by government instrumentalities was repeatedly emphasized during the hearings on the bills that eventually became the Federal Power Act. Thus, in the Hearings on H.R. 5423 before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess. (1935), Federal Power Commissioner Seavey, who had participated in drafting the bill, explained the position of the bill's proponents in the following colloquy at pp. 397-398:

5/ This Court has held in Salt River, supra, slip op. p. 7, that REA cooperatives are not public utilities; this, however, does not prevent the Commission from directing a public utility to interconnect with, and supply energy to, a non-public utility as distinguished from directing it to transmit energy for such non-public utility. New England Power Co. v. F.P.C., 349 F. 2d 258, 261-262 (CA1, 1965); cf., United States v. P.U.C. of California, 345 U.S. 295, 313, n. 23 (1953).

MR. PETTEGILL. Mr. Commissioner, you just said a moment ago that as you construed the bill, a private power line could not be required to carry electric energy generated by the Tennessee Valley Authority or a municipal plant owned by a city, or a State; is that correct?

Commissioner SEAVEY. Yes; that is my understanding of the bill.

* * * * *

I think that municipalities are particularly excluded, and it is my belief that any other Federal agency, any other governmental agency, would be excluded under the terms of the bill.

Mr. DeVane, the Commission's Solicitor at the time and another of the bill's draftsmen, reiterated this view in another colloquy.

House Hearings, supra, at pp. 514-515:

Mr. WOLVERTON. Under the provisions of this bill, would it be possible for the Government in any of its electric operations to utilize the transmission lines of private companies?

Mr. DeVANE. No sir; and I want to make that very definite; and if there is any doubt about it, so far as I am concerned, such amendment might be made as to make it clear. We have attempted in this bill, Mr. Wolverton, to accomplish these two purposes: One is not to supersede, but aid State regulation; and insofar as rates are concerned, to deal only with rates that State Commissions cannot regulate.

We have, insofar as State, municipal, or Government projects are concerned, excluded them from the jurisdiction of the Commission or from coming under this act. We have been earnest and honest in our effort to accomplish this result. We think we have done it. If we have not and it is the desire of Congress not to bring Government projects under the jurisdiction of the Commission, or give the municipal or governmental projects the right to use the

transmission lines of private industry--and we have not succeeded in making that clear in this bill--an amendment should be proposed that will do it better. It will receive our hearty endorsement.

Mr. WOLVERTON. Let me suggest a possible situation. Your answer will clarify my mind considerably as to the effect of this bill in the particular instance: Assume that a municipality built a plant for the generation and distribution of electric energy; assume that a distant community is serviced by a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State. Could the city which has constructed a plant, but has no transmission lines, utilize the system of transmission lines constructed by the private company?

Mr. DeVANE. No, sir.

Later, Mr. DeVane again explained that the "bill gives the Commission no control over the energy that is produced by municipalities or the Federal Government agencies." Id. at p. 564. See also Hearings before Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess. at p. 260 (1935); United States v. P.U.C. of California, 345 U.S. 295, 313, n. 23 (1953).

While Paris seems to concede (Br. pp. 10, 19-20) that this history supports the Commission's view that public utilities were not to be compelled to transmit energy generated by a government instrumentality,^{6/} it makes the unsupported assertion (Pet. Br. p. 30) that the

6/ KU argued before the Commission, and may here, that the Commission also lacks authority to compel an investor-owned public utility to transmit energy generated by any other person, irrespective of that other's character. While the Commission did not pass on this question, it should be recognized that Section 202(b) expressly authorizes the Commission to direct a public utility to exchange energy with "one [Footnote continued on following page]

legislative intent was to withhold from the Commission only authority to require investor-owned public utilities to use their transmission facilities for point-to-point deliveries as contrasted with "simply" displacements." But in the context of the public versus private power conflict the attempted distinction is meaningless. The result is precisely the same whether the investor-owned utility carries the energy directly from the generator of the public power plant to the point of receipt by the customer or whether the investor-owned utility receives and uses that energy in its own system and delivers an equivalent amount of its own energy or energy received from other sources to the customer. See n.6,supra, p.11, and below. What was sought to be prevented was the compulsion on a private power company to use its transmission facilities to transmit energy generated by a public

or more other persons engaged in the transmission or sale of electric energy." On its face, this language seems to authorize the Commission by order to require public utility B to receive energy from "other person" A (providing, as noted in the text above, that A is not a government instrumentality) and simultaneously or at another time to deliver an equivalent amount of energy to C. But the Commission has not yet dealt with the issue (R. 2407), and since, as this Court noted in Salt River, supra, slip op. p. 8, 'n. 8, resolution of that type of question depends on the Commission's findings with respect to conditions in the power industry bearing upon jurisdiction viewed together with the statutory language and its legislative history, this Court is not free to do so in the first instance. S.E.C. v. Cheney Corp., 318 U.S. 80, 88 (1943), 332 U.S. 194, 200 (1947); Connecticut Light & Power Co. v. F.P.C., 324 U.S. 515, 534-535 (1945). The need for the Commission's view as to its jurisdiction, based on its expert knowledge of conditions in the industry, makes judicial abstention prior to the Commission's decision on the point in question appropriate within the holding in Lee v. Kennedy, 111 AppDC 35, 294 F. 2d 231, certiorari denied, 368 U.S. 926 (1961).

power company to customers for whom they were both competing.

Assuming that to do so would be competitively disadvantageous, transmission by displacement rather than from point to point would not make it less so.

The claimed inconsistency (Pet. Br. pp. 32-33) between the Commission's decision in this case and its tentative Opinion No. 508

Crisp County Power Commission v. Georgia Power Co., Docket No. E-7120, December 5, 1966, is non-existent. In Crisp County, the parties submitted a proposed contract, voluntarily entered into, providing, inter alia, for an interconnection between them "through which Crisp County can receive maintenance energy, emergency energy, replacement energy, and possible SEPA power from Georgia Power's system" (mimeo, p. 21, emphasis supplied). SEPA is the Southeastern Power Administration within the Department of Interior. Had the contract been approved there would have been no inconsistency since the availability of SEPA power was nothing more than a mere possibility and, in any event, the Commission would not have been requiring Georgia Power to transmit SEPA's energy, the agreement being voluntary. The fact is, however, that for reasons not here relevant, the Commission found that the contract failed to meet the standards of the Act and, therefore, the Commission withheld its approval. It did, however, find it necessary and appropriate that the parties establish certain interconnections and sell and exchange energy to each other, and it so ordered (mimeo, pp. 23-27). There is no requirement in the Commission's order that Georgia Power transmit SEPA's energy to Crisp County.

B. The Commission Correctly Held that REA Cooperatives Are Government Instrumentalities for the Purposes Here at Issue

As the Commission noted (R. 2407), it had previously held in Dairyland Power Cooperative, 37 FPC 12 (1967), that the Section 201(f) exemption, App., infra, p. 24, which explicitly excludes instrumentalities of the United States from Power Act regulation, was intended to apply to REA cooperatives as "the instrumentalities chosen by Congress for the purpose of bringing abundant, low cost electric energy to rural America." 37 FPC at 18. The considerations leading to this conclusion, as well as the reasons for not giving the Commission the authority to compel a privately-owned public utility to transmit energy generated by government instrumentalities, plainly support the view that REA cooperatives are properly deemed to be encompassed within this prohibition for the purposes of the Federal Power Act.

Although the status of REA cooperatives as government instrumentalities within the meaning of the Power Act seems to be a question of first impression, it is nevertheless noteworthy that, many years ago in a somewhat different context, the Commission reached the conclusion that Congress intended the term "instrumentality" to include all entities other than those capable of characterization as private enterprise. Nebraska Power Co., 5 FPC 8 (1946). This case involved the proposed issue of securities by an electric utility, the common stock of which had been acquired by a committee of private citizens. In finding that the committee was a quasi-public corporation, the Commission held it was being

used by a political subdivision of the State of Nebraska as "an appropriate and fitting instrumentality" for its purposes, stating:

It is clear that section 201(f) exempts the United States and State governments, their political subdivisions, and their agencies and instrumentalities from the general provisions of Part II of the Act, as well as corporations wholly owned, directly or indirectly, by any one or more of them. The exemption has been applied to sovereign governments, and their political subdivisions and instrumentalities, as distinguished from private enterprise. We think this obviously discloses a Congressional intent to subject private enterprise alone to regulation by the Federal Power Commission
* * *. (5 FPC at 18-19, emphasis supplied.)

The word "instrumentality", as the seemingly inconsistent judicial holdings make clear, is not a word of art, applicable irrespective of context, but rather a term to be applied in the light of the statutory design and purpose. For example, local cooperative organizations of borrowers through which the Federal Land Bank makes loans to individuals have been held to be federal instrumentalities for one purpose and not for another within the intent of the same Act. Knox National Farm Loan Association v. Phillips, 300 U.S. 194, 202 (1937); Federal Land Bank v. Gaines, 290 U.S. 247, 254-255 (1933). The Federal Land Bank itself has been held not to have the immunities of a federal instrumentality so as to protect its property from attachment for real estate commissions, Federal Land Bank v. Priddy, 295 U.S. 229 (1935), but to have the full immunity of such instrumentality from state sales taxes on materials used to repair real property acquired by

foreclosure. Federal Land Bank v. Bismarck Lumber Co., 314 U.S.
95, 102-103 (1941).
7/

The local cooperative associations organized under the Federal Farm Loan Act (12 U.S.C. 641, et seq.) were formed by borrowers to obtain loans for specified agricultural purposes from Federal Land Banks and, even though they have many of the attributes of independence enjoyed by electric cooperatives, have been held to be federal instrumentalities. Knox National Farm Loan Association v. Phillips, supra. The members elect their own directors who in turn select their officers; they formulate their own articles of association but, within prescribed limitations, they determine the eligibility of proposed borrowers; and exercise other powers as cooperatives (12 U.S.C. §761). Although their creation as corporations was expressly provided by statute (12 U.S.C. §711), it is not the form of organization but their use as an arm or device for implementing the farm loan program and the controls exercised over their operations that distinguishes them from persons who are not

7/ Paris notes (Br. p. 11) that City of Anchorage v. Chugach Electric Association, 252 F. 2d 412, 419 (CA9, 1958), held that an REA cooperative was not a government instrumentality so as to be immune from municipal taxes. But as the text above shows, the Congressional intent must be effectuated even though it results in a classification for the statutory purpose quite different from that for other purposes. United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 400 (1965); N.L.R.B. v. Hearst Publications, 322 U.S. 111, 122 (1944); Gray v. Powell, 314 U.S. 402, 416 (1941); Magruder v. Yellow Cab Co. of D.C., 141 F. 2d 324 (CA4, 1944); Commissioner of Internal Revenue v. Slagter, 238 F. 2d 901, 903 (CA7, 1956).

instrumentalities of government. The electric cooperative, independent as to organizational set-up but dependent upon the REA as to the manner in which it operates, serves in a comparable manner as the effectuating agency of the rural electrification program.

This Court, although not resting its affirmance of the Commission thereon, suggested strongly the correctness of the conclusion in Dairyland, supra, 37 FPC at 18, that REA-cooperatives are the tool chosen by Congress to bring electricity to rural areas, Salt River, supra, slip op. p. 11:

* * * [T]he Rural Electrification Act * * * constituted simply an attempt, through rural electrification cooperatives, to bring economical electric power to the nine out of ten farms that were then without it. 13/

13/ 2 1955 U.S. Code Cong. & Adm. News 2041-2042, 84th Cong., 1st Sess.

Plainly, cooperatives are not instrumentalities simply because they borrow from REA or because they are non-profit organizations 8/ (Pet. Br. p. 15). They are government instrumentalities because they are the instrumentalities chosen by the government to bring electric energy to rural areas that investor-owned companies at the time could not, or would not, serve. Accordingly, Paris' argument (Pet. Br. p. 14) that, if REA cooperatives are government instru-

8/ Buckeye Power, here referred to by Paris (see also Pet. Br. p. 33), is not an REA borrower and is subject to none of the regulatory controls over such borrowers which the Court in Salt River, supra, slip op. p. 6, noted the REA exercises. Instead, Buckeye Power plans to borrow \$62,000,000 from private lenders.

mentalities because they receive REA loans then investor-owned companies that borrow from REA are also exempt government instrumentalities, is a straw man. The fact that an occasional investor-owned company borrows from REA for a minor facet of its utility operations does not make it a government instrumentality. Regulation of investor-owned utilities was not intended to be affected by the Rural Electrification Act and there is no evidence of an intent to alter FPC regulation of such utilities simply because REA might lend them money for the development of rural electric service (relatively infrequent occurrences involving insignificant amounts).^{9/}

The scope of Section 201(f) was self-evidently intended to be widely inclusive. It covers the federal and State governments, their political subdivisions, agencies, authorities, instrumentalities, their directly or indirectly wholly-owned corporations and officers, agents and employees of any of these acting officially. The breadth of this enumeration evinces a purpose to make inclusion depend on relationship of purpose rather than on organizational structure. Were this not so, some of the specifications, particularly the word "instrumentality" would be redundant; if only political entities, subdivisions and their corporate subsidiaries and employees had been intended to be covered, that word would have been sheer

9/ As of the end of calendar 1962, 1096 loans had been made by REA, 100 of which had been repaid in full. Twenty-four loans in all (2.2 percent in number and 0.4 percent in dollar amounts) were made to private companies; 993 loans were made to cooperatives, 51 to public power districts and 28 to "other public bodies." REA Bulletin 1-1 (1962 Annual Statistical Report of REA Borrowers), p. V.

surplusage. It becomes meaningful only by drawing within the ambit of the section entities that do not meet the other specifications.

Since, as this Court has held in Salt River, supra, REA cooperatives were not intended to be, and are not, public utilities under the Power Act, it is altogether reasonable to suppose that they were intended to be covered by Section 201(f) and that this was accomplished by inclusion of the otherwise superfluous word instrumentality.

Lack of more precise definition in Section 201(f) may have its explanation, as the Commission has suggested,^{10/} in the fact that the Power Act was adopted when the federal rural electrification program was in its infancy, at a time when the form of organization REA might employ to carry out its purposes was uncertain. In these circumstances a word of the generality and breadth of "instrumentality" would be essential to bring the cooperatives within the exemption from jurisdiction of Section 201(f).

The legislative history showing that public utilities were not intended to be compelled to transmit electricity for government instrumentalities also demonstrates the reasonableness of including REA financed cooperatives in this category. Parts II and III of the Federal Power Act were added to the former Federal Water Power Act by Title II of the Public Utility Act of 1935 (49 Stat. 838) at a time

^{10/} The Commission said in Dairyland Power Cooperative, supra, 37 FPC at p. 17: "Of course, the particular form the REA Cooperatives would ultimately assume was not known at the time since this legislation was enacted in the year following passage of the Federal Power Act. Undoubtedly with this in mind, the exemption provision was drafted broadly. * * *"

when the struggle between the advocates of private and public power was acute. While the private power camp was under vigorous attack--the Public Utility Holding Company Act, of which Parts II and III of the Federal Power Act were a part, was designed to put an end to holding company abuses--the private power interests and their defenders counterattacked public power. Although much of the struggle centered on TVA, the bete noire to the private power interests and the shining example to the public power interests, it was never in doubt that what the former feared and contended against was what they considered the unfair competition of organizations of whatever kind that were supported by government loans at low interest rates, tax benefits, etc.

Typical was the attack on TVA. Unable to prevent its creation,
^{11/} its foes tried to curb its development and growth. In this connection an important factor was the availability of means of transmitting TVA power to load centers and one of the questions to be resolved was whether private lines would be utilized or whether TVA would have
^{12/} to build its own lines (and, in that case, secure Congressional authorization and appropriations therefor).

^{11/} See, e.g., the statement of Representative Cooper, 79 Cong. Rec. 10328-10329 (June 27, 1935); House Hearings, supra, pp. 1090-1091, 1147, 1199, 1518, 1574-1575; Joseph S. Ransmeier, The Tennessee Valley Authority, Vanderbilt University Press, 1942, pp. 61-71.

^{12/} See, e.g., The Journals of David E. Lilienthal, Harper and Row, 1964, Vol. I, pp. 711-715.

^{13/} Lilienthal, supra, p. 713.

Thus, part of the context in which the proposed new Parts II and III of the Power Act were considered were the vigorously reiterated fears by private power proponents of the allegedly unfair competitive advantages of public power entities. And the supporters of the bill sought over and over again to make it clear that, inter alia, the Federal Power Commission would have no authority to compel a private-power entity (an investor-owned public utility) to transmit energy generated by a public power entity. See, supra, pp. 9-11.

Throughout the discussions the emphasis was on public versus private power plants. For example, in the House Hearings, supra, at p. 481, it was said:

The Chairman: [Referring to TVA, etc.] The reason why these things are not brought under this agency [the FPC] of the government is that they are not operated for private profit. Is this not true?

Mr. DeVANE: That is correct, sir. These are regulatory matters we are not concerned with.

It is unreasonable to suppose that it was intended to protect private (investor-owned) power plants from having to transmit energy for what many considered unfairly advantaged competitive federal, State or municipal plants but was not intended to protect them from having to transmit energy for cooperatives to which the government had granted similar advantages. For example, in a somewhat different context, the following colloquy took place at the House Hearings, supra, at p. 2161:

Mr. PETTENGILL. I am not attempting to argue it. I simply want to find out if both are going to be treated impartially and alike and the Government will not be engaging in competition with private industry in carrying out its rural electrification program.

The CHAIRMAN. May I make this observation on that point: It has been my conception that the Government wants to give these rural communities electric service, and I think it would like to have the private companies do that if they could possibly do so.

The logic of the legislative history is clear. It shows, explicitly for municipalities and other government instrumentalities, that it was intended that the Commission should not have authority to require investor-owned public utilities to transmit energy generated by them. The issue of claimed unfair competition underlying that intent was equally applicable to REA cooperatives which were included as government instrumentalities under Sections 201(f) and 202(b).

CONCLUSION

The Commission correctly stated the limitations on its powers with respect to energy generated both by municipalities and REA cooperatives. Its order should therefore be affirmed.

Respectfully submitted,

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March 11, 1968

APPENDIX

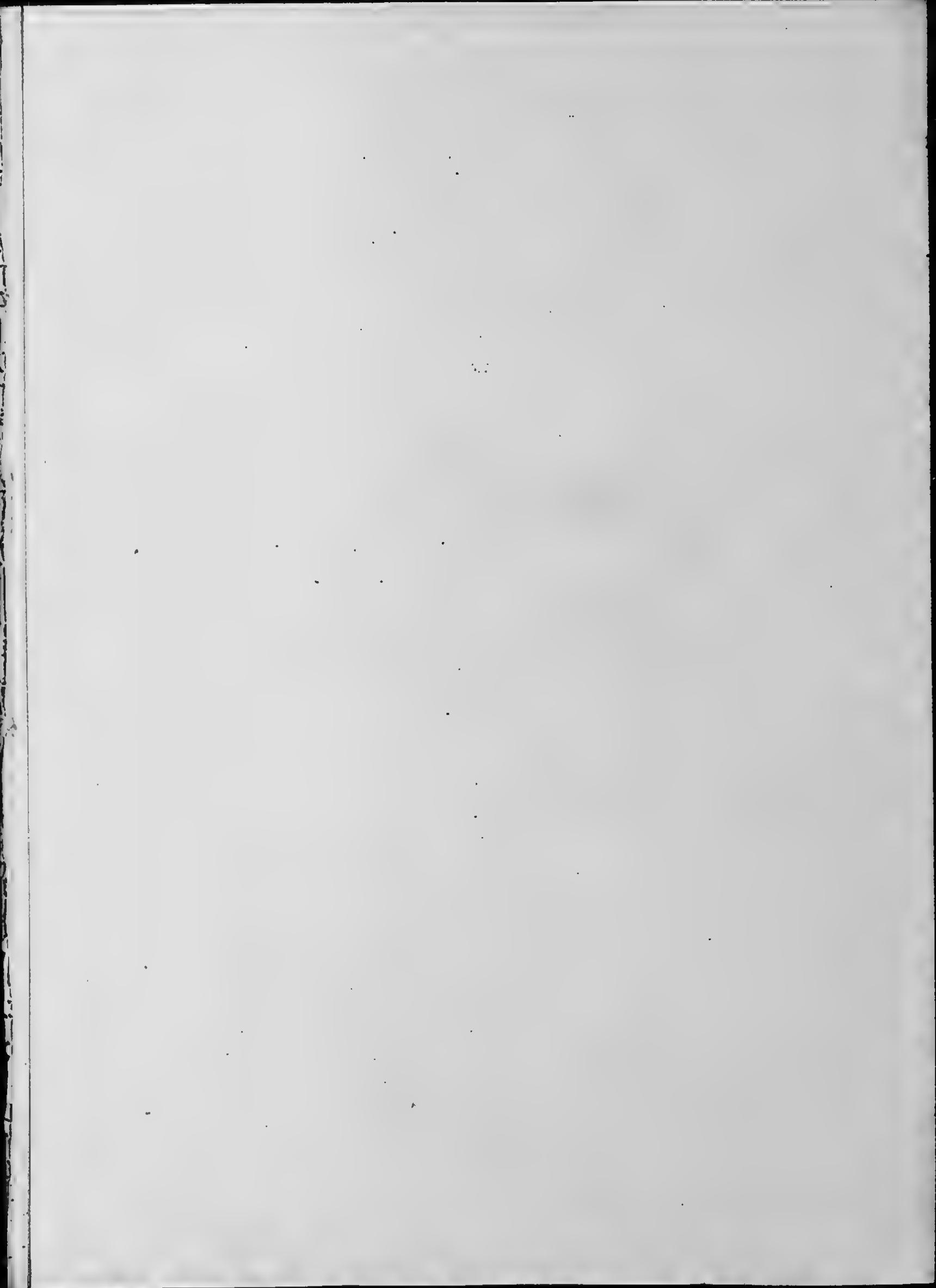
STATUTE INVOLVED

The Federal Water Power Act (Act of June 10, 1920, 41 Stat. 1063, 16 U.S.C. 791-823) as subsequently amended, including amendments and additions and change of name by Title II of the Public Utility Act of 1935 (Act of August 26, 1935, c. 687, 49 Stat. 838, 16 U.S.C. 791a-825r), provides in pertinent part:

Sec. 201(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

* * * * *

Sec. 202(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: Provided, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.



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REPLY BRIEF FOR PETITIONER.

IN THE

United States Court of Appeals

*ed States Court of Appeals
For the District of Columbia Circuit, the District of Columbia Circuit*

FILED APR 1 1968

No. 21375

Nathan J. Paulson
CLERK

CITY OF PARIS, KENTUCKY,

- Petitioner,

versus

**FEDERAL POWER COMMISSION,
KENTUCKY UTILITIES COMPANY,**

- Respondent,
- Intervenor.

**On Petition to Review an Order of the
Federal Power Commission.**

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IN THE

United States Court of Appeals
For the District of Columbia Circuit.

No. 21375

CITY OF PARIS, KENTUCKY, - - - Petitioner,
v.

FEDERAL POWER COMMISSION, - - - Respondent,
KENTUCKY UTILITIES COMPANY, - - - Intervenor.

ON PETITION TO REVIEW AN ORDER OF THE
FEDERAL POWER COMMISSION.

REPLY BRIEF FOR PETITIONER

PRELIMINARY STATEMENT.

At the outset of this reply it would appear appropriate to comment on this Court's recent opinion in *Salt River Project v. FPC*, — App. D. C. —, — F. 2d —, CADC No. 20960, February 15, 1968. This case was an effort on the part of Colorado-Ute to get FPC protection against a state court order invalidating a certificate to construct a steam generating plant. Based upon the *Dairyland* decision, 37 FPC 12 (1967), this Court affirmed a holding of FPC that it lacked jurisdiction to grant the relief requested.

Dairyland, as pointed out in the initial brief for petitioner, said that rural electric cooperatives were exempt from Commission jurisdiction, being "instrumentalities" of the United States as provided in § 201(f).¹ of the Federal Power Act. It also said rural electric cooperatives were not "public utilities" as defined by § 201(e) of the Federal Power Act. This Court, in the *Salt River* case, speaking through Judge Wright, states, "we affirm that (*Dairyland*) determination on the ground that Colorado-Ute, as an REA financed cooperative, is not a public utility within the meaning of Parts II and III of the Federal Power Act." This Court thus did not go as far as the Commission in either the *Salt River*, the *Dairyland* or the instant case, to say that rural electric coops are "instrumentalities."

The distinction is quite important to our case because § 202(b) authorizes relief to "persons." It says the Commission may order a utility "to establish physical connection of its transmission facilities with the facilities of one or more other persons. . . ." In the instant case Paris was held to be a person. Obviously, East Kentucky Rural Electric Cooperative is also a person. And so, unless this Court follows the part of *Dairyland* holding that rural electric cooperatives are instrumentalities of the United States, and unless it further interprets a few scraps of congressional history to indicate that instrumentalities of

¹References are made herein to the Federal Power Act §§ 201(e), 201(f) and § 202(b). These sections are quoted in Petitioner's brief, 8a and 9a, and are otherwise cited as 49 Stat. 847, 16 U.S.C. §§ 824(e), 824(f) and 824a(b), respectively. They are from the Federal Water Power Act, June 10, 1920 as amended by the Federal Power Act, August 26, 1935.

the United States are excluded from those covered by 202(b), then the arrangement between Paris and East Kentucky would be within the authority of the Commission as requested in the original complaint. *Dairyland* could still stand to prohibit general jurisdiction of FPC over REA financed cooperatives.

And, so, though we contend this Court and the Commission were in error in holding a generation and transmission cooperative selling wholesale for resale in interstate commerce is not a utility under the Act, it is still a person and the clear language of 202(b) authorizes interconnection between a utility on the one hand and persons, like East Kentucky and Paris, on the other.

Another item for preliminary note is the personal reference in the KU brief, pages 11 and 12, directed at Paris' counsel and engineering adviser. This is regrettable yet we find it such common practice with KU as to be of little special significance. It may be worthy of note, however, that in a recent case decided by the Supreme Court, the small villages of Tazewell and New Tazewell, Tennessee, were fighting to escape the stranglehold of KU and KU made many similar charges including, as the Supreme Court says, "conspiracy to destroy its Tazewell business." The Supreme Court in this case denied KU's plea to keep TVA power out of the towns. *Hardin, et al. v. Kentucky Utilities Company*, — U. S. —, Nos. 40, 50 and 51, October Term, 1967, decided January 16, 1968.

As a final preliminary comment we reject the statements made in both the FPC and KU briefs alleging that the Commission in the instant case held itself without authority to order an investor company to transmit power generated by a municipality. The Commission's order directs KU to exchange energy with Paris. This means KU is ordered by the Commission to accept into its transmission system power generated by Paris. Further comment about this matter will be made in the argument, *infra*.

ARGUMENT.

L

The Relief Asked by Paris Is Necessary and Appropriate in the Public Interest.

Section 202(b) of the Federal Power Act says FPC may direct an interconnection between a utility and one or more persons engaged in the transmission or sale of electric energy when it "finds such action necessary or appropriate in the public interest." KU in its brief—and this is backed up in numerous places in the Commission brief—contends that it is entitled to maintain its monopoly right to dominate Paris. It says "it has been established for years that competition in the electric utility industry is not the means to most efficient and economical service to the ratepayer" (KU brief, p. 15). It continues to argue against "duplication of facilities" in complete disregard of the undenied fact that by getting the interconnection requested here Paris can eliminate con-

struction of eight miles of transmission line through a rich farm area which would be a complete duplication of existing facilities. Paris is still free to build that line, and it may well be built if relief cannot be had otherwise.

KU says its position is sustained by "decisions of Kentucky's highest appellate court." The KU brief (p. 16) cites the case of *City of Cold Springs v. Campbell County Water District*, Ky., 334 S. W. 2d 269 (1960). It ignores the two major cases decided by the Kentucky Court of Appeals, both of which rejected KU's request for maintenance of its monopoly position when the two major generation and transmission cooperatives came into existence in Kentucky to compete with KU. The Court of Appeals of Kentucky turned down this argument of KU in the case of *Kentucky Utilities Company v. Public Service Commission*, Ky., 390 S. W. 2d 168 (1965), when the Big Rivers generation and transmission cooperative was certificated for construction. It also rejected KU's plea to maintain its monopoly position in *Kentucky Utilities Company v. Public Service Commission*, Ky., 252 S. W. 2d 885 (1952). This was the case which affirmed in part the certification and commencement of operation of the East Kentucky generation and transmission system.

Furthermore, the argument that Kentucky Utilities makes for continuation of its monopoly, which is supported in the Commission brief, is directly contra to the body of existing law developed by the Supreme Court. In the case of *Alabama Power Company v.*

Itkes, 302 U. S. 464 (1938), *Tennessee Electric Power Company v. TVA*, 306 U. S. 118 (1939), and *Kansas City Power and Light Company v. McKay*, 96 App. D. C. 273, 225 F. 2d 924 (1955), cert. den. 350 U. S. 884 (1955). The latest case where the Supreme Court stuck to this principle was the above-cited *Hardin, et al. v. Kentucky Utilities Company*, — U. S. — (1968). The Supreme Court has clearly manifest the law that power companies have no legal right to be free from government competition. Thus the whole argument of KU, which is supported by the Commission brief, must fail unless this Court is prepared to change the rules.

As a further matter indicating the relief requested is necessary and appropriate in the public interest, it is well to note the testimony of Paris' Commissioner and Mayor pro tem, James L. Gorey, who testified as to the real reason why Paris did not want to deal with KU:

"Well, those of us who have been connected with the City and familiar with its problems feel that we have plenty of reason to mistrust KU and its intention. The City of Paris has been suffering from lack of industrial development for a number of years now. We have not gained any industries whereas the towns all around us have been getting quite a few new industries. In fact, we lost one of our biggest ones and that factory has been standing vacant now for almost four years. Rightly or wrongly, this conflict and mistrust that has existed between KU and the City is believed by many people to be one of the reasons

that is retarding the City's industrial development. There are many of us that think that KU has been exercising its influence to hold Paris back and keep it from getting new industry. I can't prove this, but it is an opinion which is widely held in the City of Paris" (R. 109).

Some of the reason for Mr. Gorey's comment is written into the law of Kentucky in a succession of cases which chronicle the long struggle of Paris to be rid of domination by KU.

Beginning in 1931 Paris sought unsuccessfully to fight a gas rate increase imposed by KU, KU then being a supplier of both gas and electricity. *Kentucky Utilities Company v. City of Paris*, 237 Ky. 488, 35 S. W. 2d 873 (1931). Shortly after that, when Paris issued bonds to build its electric system, KU attacked the bond issue and failed after carrying the matter to the high court of the state. *Kentucky Utilities Company v. City of Paris*, 248 Ky. 252, 58 S. W. 2d 361 (1933). When KU's franchise ran out in 1929, Paris for a number of years refused to offer KU a new franchise. KU sued and this time KU was successful when the court said Paris must offer KU a new franchise. *Kentucky Utilities Company v. Board of Commissioners of the City of Paris*, 254 Ky. 527, 71 S. W. 2d 1024 (1934). Then Paris, having the money from its bond issue made a contract to construct its electric system and KU attacked the construction contract and again challenged Paris' right to build. KU failed. *Kentucky Utilities Company v. City of Paris*, 256 Ky. 226, 75 S. W. 2d 1082 (1934).

In 1936 the Kentucky Legislature enacted a statute which Paris interpreted to mean it might expel KU. Paris, accordingly, brought a suit to force Kentucky Utilities to get out. Paris failed. *City of Paris v. Kentucky Utilities Company*, 280 Ky. 492, 133 S. W. 2d 559 (1939). Then Paris, upon the expiration of the KU franchise, offered KU a two year franchise. KU sued again and the court held this was unreasonable and that Paris must offer a franchise extending at least ten years. *Kentucky Utilities Company v. City of Paris*, 297 Ky. 440, 179 S. W. 2d 676 (1944).

We submit that testimony of Mr. Gorey together with thirty-seven years of almost constant litigation helps us understand the desire of Paris to avoid any further relationship with KU which would enhance KU's power of domination over the city.

II.

The Commission Is Now Exercising the Very Power Respondent and Intervenor Say It Doesn't Have.

In its counterstatement of questions presented, the Commission brief states the question presented as being "whether the Commission correctly held that it has no authority to compel an investor-owned public utility to transmit power generated either by a municipality or by an REA financed cooperative." (Emphasis added.)

Throughout both respondent's and intervenor's briefs there are numerous comments that an investor company cannot be made to transmit power generated

by a municipality. But the order of the Commission here directs KU to do just that. The Commission might have said it was not in position to order KU to transmit power for Paris but if KU wished to do so it would approve that decision. But the Commission did not say this. The Commission ordered Kentucky Utilities Company to interconnect and sell and supply energy to Paris "under the rate schedule as supplemented." The rate schedule called for power exchanges between Paris and KU (Brief of Petitioner, 6a). The presiding examiner in his order directs KU "to sell energy to and exchange energy with Paris" (KU Brief, p. 28a). Both of these orders direct KU to carry Paris' power over its lines.

The decision in this particular respect is completely consistent with other decisions the Commission had made. The *Crisp County* case is a perfect example.² There the Commission directed the Georgia Power Company to interconnect and exchange power with Crisp County—a government instrumentality—and also it said one of the sources from which Crisp County might receive power over Georgia Power Company lines was power from the Southeastern Power Administration. For all the effort made in the Commission Brief (p. 13) to say there is no inconsistency here, we simply reiterate that *Crisp County* clearly holds a power company may be forced to interconnect to receive power from instrumentalities of the federal government.

²*Crisp County Power Commission v. Georgia Power Company*, Docket No. E-7120, Opinion No. 508, December 5, 1966.

Another case which has been decided by an FPC presiding examiner since the initial brief of petitioner was filed herein, is the case of *Gainesville v. Florida Power Corporation*, FPC Docket No. E-7257, January 17, 1968. In this case Florida Power Company was ordered by FPC "to sell energy to and exchange energy with Gainesville upon the terms and conditions ordered below. . . ." The *Gainesville* and *Crisp County* cases are both, like the *Paris* case, instances where the Commission has directed an investor owned utility to interconnect and transmit power generated by a municipality or other type instrumentality of the government over the investor company's transmission system. "Exchange" means *deliver and receive*.

Also, we say again as stated in our initial brief, that the Commission in *Buckeye Power, Inc., and Ohio Power Company*, FPC Docket No. E-7355, August 4, 1967, retained jurisdiction over a cooperative type organization owned by rural electric cooperatives. The Commission staff brief (p. 17) says Buckeye Power is "not an REA borrower." It neglects to mention that Buckeye got its very first money by borrowing money from rural electric cooperatives which were REA borrowers to the tune of many millions of dollars. This, under circumstances where the administrator of REA had to approve the transaction before it could become effective. So we reiterate, the action of the Commission in *Buckeye* is completely inconsistent with what the Commission says in the *Paris* case. What the Commission said

it could do in the *Paris* case is even inconsistent with what the Commission in fact did in the *Paris* case, namely, it ordered KU to receive into its transmission system power generated by Paris, a governmental entity.

III.

The Words of the Statute Clearly Authorize Granting the Relief Paris Requests.

It is too ordinary a principle to require citation of authority that where the language of a statute is clear it is not necessary to resort to legislative history or go through intricacies of statutory interpretation. There are many good reasons for this rule, but one of the less obvious ones is that when a controversial piece of legislation passes Congress, comments of protagonists and antagonists are stuck in the record in many directions. If the courts are to allow a few comments which work their way into the record to be controlling against the common sense words of the statute, it will greatly encourage a questionable practice. Members of the Congress who, seeing themselves about to be defeated on an issue will work hard to plant words in the record, later to be used to subvert the purpose of the majority of the Congress by judicial action.

We admit that there are comments in the history of the Federal Power Act that tend to indicate contrariwise to the plain language of § 202(b). We urge that these comments were largely directed at firm power deliveries from TVA, which was then gaining potency as a competitor of the investor companies.

This explains the wording of § 201(f) which talks about instrumentalities of the United States, a state or any political subdivision of a state "which is wholly owned, directly or indirectly, by any one or more of the foregoing."

But, the clear language of § 202(b) says the Commission, when it finds such action necessary or appropriate in the public interest may order a public utility to establish connection of its transmission line "with the facilities of one or more other persons engaged in the transmission or sale of electric energy." The Commission in the present case has found Paris to be a person. Obviously East Kentucky is also a person, if not in fact a utility as defined under the Act. It is, therefore, difficult to say how much more clearly Congress could have put it than it did in adopting the language that now appears in the statute.

IV.

The Consequences of Affirmance Are Chaotic.

It is our devout hope that regardless of what this Court decides, it will clarify the issues involved. As we stated in the initial brief, it is extremely difficult to lay hold on the specific decision of *Dairyland*, that is: Did the Commission say it was without authority to regulate coops because they are instrumentalities of the federal government, or because they are not utilities, or because Congress never intended FPC to regulate them? All three of these things are stated. The *Salt River* decision before the Commiss-

sion simply adds to the confusion. The *Salt River* decision which recently was handed down by this Court appears to say that relative to the relief therein requested, the Commission had no jurisdiction over Colorado-Ute because Ute was not a "utility" within the meaning of the Act. This Court's decision in *Salt River* does not lay hold on the question of "instrumentality."

The Commission staff brief in arguing to sustain the Commission decision relies heavily upon the *Federal Land Bank Cases* (pp. 15-16). These cases largely hold the Federal Land Bank is an instrumentality of the United States and immune from local taxation. This Court has been apprised of the decision of *City of Anchorage v. Chugach Electric Association*, 252 F. 2d 512 (9th Cir., 1958), wherein it was held that rural electric coops were by no means agencies of the United States Government, or government instrumentalities so as to be immune from local taxation.

Admittedly this Court, if it should desire to do so, could find coops to be "instrumentalities" for several purposes and not to be "instrumentalities" for several other purposes. This kind of reasoning makes for great confusion and hardship. We urge this Court to say explicitly whether it holds rural electric financed cooperatives to be instrumentalities of the United States or not. If it does hold them to be instrumentalities we hope the decision will let them be instrumentalities for all purposes normally flowing from that status. If, however, the Court should say

that rural electric financed cooperatives are instrumentalities only for the purpose of not being subject to regulatory authority other than REA, then it would seem to us only reasonable to say this means all utility regulatory authority except REA and not simply the Federal Power Commission. That is, they should be instrumentalities for the purpose of avoiding utility regulation at either federal or state level.

The direct consequences which may flow from allowing this decision to stand are those relative to the survival of the small independent systems. If the Commission decision stands it will be utterly impossible for small municipal or cooperative systems to participate in any wise other than by complete agreement of the utility companies in pooling arrangements. These power pools now offer such vast economies of scale as to be essential to the continued existence of almost any system. This was clearly recognized in the National Power Survey. Yet it is a strange thing that the Commission, having put its stamp of approval on the high purposes stated in that survey, has been so completely unwilling to interpret its own act to carry out those purposes. The survey states:

“A major purpose of the National Power Survey is to suggest alternatives to small and inefficient generating plants which will permit the small distribution systems to persevere and prosper by sharing in a power supply from large-scale, low-cost sources on reasonable terms and with assurance of adequate supply for further expansion.

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"It is hoped that this Survey will serve to accelerate interest in more comprehensive industry planning and will direct the attention of all systems in every segment of the industry to the attainable levels of achievement and the relative significance of the various avenues for realizing economic gains for their systems and their customers." *National Power Survey, 1964, Vol. 1,* at 272 and 288.

CONCLUSION.

For the reasons hereinabove and heretofore stated, petitioners again submit that the Commission's opinion and order herein should be reversed and that the cause should be remanded to the Commission with instructions directing the Commission to grant the relief requested in the complaint.

Respectfully submitted,

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